

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-2050

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Respondent-Appellee.

DOCKET NO.
75-2050

APPENDIX FOR PETITIONER-
APPELLANT

ON APPEAL FROM A MEMORANDUM-DECISION
AND ORDER
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

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PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Docket Entry.....	A-B
Petition for Writ of Habeas Corpus with annexed Exhibits.....	1-79
Memorandum-Decision & Order of the Hon. James T. Foley, U.S. District Judge, dated the 4th day of January, 1974.....	80-84
Memorandum-Decision & Order of the Hon. James T. Foley, U.S. District Judge, dated the 22nd day of January, 1974.....	85
Decision of the U.S. Court of Appeals for the Second Circuit No. 1040- September Term, 1973.....	86-88
Writ of Habeas Corpus dated the 15th day of August, 1974.....	89-90
Memorandum-Decision & Order of the Hon. James T. Foley, U.S. District Judge, dated the 14th day of August, 1974.....	91-92
Court Exhibit "1".....	93-124
Court Exhibit "2".....	125
Memorandum-Decision & Order of the Hon. James T. Foley, U.S. District Judge, dated the 4th day of February, 1975.....	126-141

73-CV--

D. C. Form No. 106 Rev.

[illegible]

DATE	PROCEEDINGS	Date of Judgment
1973		
Dec. 10	(1) Filed Petition for Writ of Habeas Corpus-forwarded Petition to Judge Foley per to Order of Rotation and Assignment	
1974		
Jan 7	(2) Filed Memorandum-Decision and Order (1/4/74) denying and dismissing petition lack of federal substance- SO ORDERED-HON. JAMES T. FOLEY	
" 7	(3) Filed judgment	
" 18	(4) " Notice of Appeal -copies sent to Clerk, CCA and Castellani, Asst. Atty	
" 18	(5) " Application for certificate of probable cause	
" 22	(6) " Memorandum-Decision and Order (1/22/74) granting certificate of probable	
" 22	(7) " Certificate of Probable Cause (SO ORDERED (Fol	
Feb. 11	(8) " Motion for leave to appeal in forma pauperis and affidavit	
" 11	(9) " Order granting permission to prosecute appeal in forma pauperis	
" 13	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.	
" 15	(10) Filed receipt for original papers forwarded to CCA	
Aug. 1	(11) " certified copy of judgment of CCA remanding action for further proced with copy of opinion attached together with all original papers.	
Aug. 9	All papers forwarded to Judge Foley in Albany for consideration.	
" 14	(12) Filed Memorandum-Decision and Order (8/14/74) directing Writ of Habeas Corp issue -SO ORDERED-HON. JAMES T. FOLEY, USDJ	
" 15	(13) Filed certified copy of Writ of Habeas Corpus	
" 21	(14) " Return of Marshal	
Sept. 4	Hearing. Decision reserved. Atty Davidoff to get copy of State Police Report. 5 days stay granted pending appeal. 14 days after receipt of report by Davidoff he is to brief and send memorandum of law to Judge Foley in Albany. 5 days for Atty to reply	
" 5	(15) Filed copy of transcript of hearing held Sept. 4, 1974 at Albany before Judge	
" 4	(16) " Court Exhibit 1	
" 4	(17) " Court Exhibit 2	
" 27	(18) " Supplemental Brief for Relator/Petitioner	
1975		
Feb. 4	(19) " Memorandum-Decision and Order (2/4/75) reaffirming decision of Jan. 4, 1974 and again denying and dismissing petition for writ of habeas corpus. Certificate of probable cause is granted and issues in regard to this decision-SO ORDERED-HON. JAMES T. FOLEY, USDJ	
" 4	(20) Filed judgment	
" 14	(21) " Notice of Appeal-filed in forma pauperis per order 2/11/74	

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, ex rel.

GEORGE FOYE,

Relator / Petitioner,

PETITION FOR
WRIT OF HABEAS
CORPUS

-against-

J. E. LAVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

-----X

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

The Petition of GEORGE FOYE, respectfully shows that:

1. Petitioner is a citizen of the United States of America and the
State of New York.
2. Petitioner is at present unconstitutionally detained and imprisoned
at the Department of Correctional Services, Clinton Correctional Facility,
Dannemora, New York, within the District for which this Court sits, by the
Respondent, J. E. LAVALLE, Superintendent of Clinton Correctional Facility,
by virtue of a judgment and sentence pronounced by the County Court of the
County of Sullivan on the 13th day of July, 1973, said judgment convicting the
Petitioner of the Class A Felony of Murder, and sentencing him to an indeterminate

term of imprisonment, the minimum of which shall be fifteen years and the maximum shall be the term of the Petitioner's natural life.

3. That pursuant to the aforesaid judgment, Petitioner is detained by the Respondent, the Superintendent at the aforesaid Correctional Facility of the State of New York.

4. Petitioner has exhausted all state remedies as required by 28 U.S.C. Section 2254, appealing the convictions and sentencing of the County Court of the County of Sullivan to the Supreme Court of the State of New York, Appellate Division, Third Department. Said Appellate Division unanimously affirmed said conviction and sentencing, a copy of which Decision is annexed hereto and marked Exhibit "A-1". Thereafter, Petitioner sought permission to appeal to the Court of Appeals of the State of New York. Permission was denied by Certificate of HON. CHARLES D. BREITEL, denying leave, dated the 12th day of June, 1973, a copy of which is attached hereto and marked Exhibit "A-2".

5. That the Petitioner is restrained and imprisoned pursuant to a judgment and sentence that is illegal and void and that the Petitioner was denied due process of law as guaranteed by the 6th and 14th Amendments to the Constitution of the United States. The facts and circumstances under which the denial of Petitioner's denial of Constitutional Rights took place, are as follows:

(a) Your Petitioner and one DELOIS HARDEN were jointly indicted for the crime of murder by indictment of the Sullivan County Grand Jury dated the 29th day of February, 1972. A severance was granted by the Sullivan County Court and your Petitioner's case was commenced by the selection of a Jury on the 16th day of May, 1972. During the Petitioner's trial, before the Sullivan County

Jury, the PEOPLE, in their direct case called as a witness, INVESTIGATOR BROWN, the officer in charge of the investigation concerning the circumstances surrounding the death of the infant for which the Petitioner was charged with the crime of murder. On direct examination the officer testified as to his conversations with the Petitioner, GEORGE FOYE, and with a DELOIS HARDEN, who was charged in the same indictment as a co-defendant, and whose case was severed and who was the prosecution's principal witness against the Petitioner. INVESTIGATOR BROWN, also testified as to his conversations with other parties. On cross-examination, INVESTIGATOR BROWN, admitted that he had made notes and from the notes had prepared a written report which he had filed with his superiors, and that he, within a month prior to his testifying, had refreshed his recollection from this written report. (Transcript-Page 397-399)

TRANSCRIPT-P. 397-399

"Q. Investigator, did you testify at the Grand Jury ?

A. I did.

MR. DAVIDOFF: I ask that the Grand Jury testimony be produced of the witness, Your Honor.

THE COURT: All right.

Q. Investigator, did you make a report--

MR. DAVIDOFF: Strike that.

Q. Were you in charge of the investigation into the death of Michael Harden ?

A. Yes, sir.

Q. And you along with another investigator from the B.C.I. conducted almost the entire investigation ?

A. That's correct, sir.

Q. And did you write up a report as to your investigation ?

A. I did.

Q. And was this report which was written up in the regular course of writing up your reports ?

A. That's correct.

Q. And this is a report which is submitted to your superior ?

A. That's right.

Q. Did this contain all the notes that you had made and all the results of your investigation ?

A. It's the entire result of the investigation.

Q. Was this submitted to your superiors ?

A. It was.

Q. Where is that submitted to ?

A. Albany, New York.

Q. Is a copy of that report kept in your files here in Ferndale ?

A. There's a copy in the building, the final disposition folder at the Ferndale barracks.

Q. And did you review this folder within the last month ?

A. Yes, I would have read it over.

Q. And that contained the same things which you have testified to today, were those things also contained in that folder ?

A. Probably not verbatim.

Q. But the notes on what you have testified to today would that be in that report ?

A. Yes, it would be.

MR. DAVIDOFF: Your Honor, I ask that that report be produced.

MR. GELLMAN: Now, Your Honor, we have been on trial since last Tuesday and this case has been going on for some period of time. The proper procedure for obtaining records-

MR. DAVIDOFF: Objection, Your Honor, I would ask we discuss this outside the jury.

MR. GELLMAN: I don't see why I can't answer it.

THE COURT: Let's get down to the realistic situation instead of discussing the legal aspects of it. Is this report available and can it be produced ?

MR. GELLMAN: You have to ask the witness, I don't know.

A. The report is in the folder at the Ferndale barracks.

THE COURT: That can be produced at some subsequent time ?

A. Right.

THE COURT: You have no objection ? Do you have a right to under your authority ?

A. If the Court orders me, sir, I have to, I'm not going to be in contempt of court.

THE COURT: You can do it some other time.

MR. DAVIDOFF: May I make this suggestion, Your Honor, if possible the report could be produced during lunch and I can look at it during lunch.

THE COURT: We'll take that up after lunch.

MR. DAVIDOFF: I have a right to look at it during lunch.

THE COURT: If we have it here. I don't want to talk about the proper procedure but if you wanted that here you could have subpoenaed it.

MR. DAVIDOFF: Your Honor, the last time it was here.

THE COURT: We are getting it for you. If he's willing to produce it you have an opportunity to look at it during lunch and you can examine it after lunch. Now go on with other aspects of your cross-examination, if you have any. "

(b) Your Petitioner's attorney made the appropriate motions to the trial court judge for the production of that report and for it to be made available in its entirety for examination by your Petitioner's counsel. The trial court judge not only refused your Petitioner's counsel the right to inspect the notes and the written report of INVESTIGATOR BROWN, but allowed the notes and written report to be brought into the court and to be reviewed, not by the trial court judge, not by the Petitioner's counsel, but by the Assistant District Attorney, who was then instructed to turn over to the Petitioner's counsel, only those portions of the notes and State Police Report, which he, the Assistant District Attorney, believed was material. Out of the entire Report, Petitioner's counsel was entitled to see only a couple of sentence excerpts. (Transcript - Page 416-418)

TRANSCRIPT - P. 416-418

"MR. DAVIDOFF: Your Honor, at this time I would like to renew my request that I be provided with the report made by the witness, State Police report.

THE COURT: Well, as I understand it I directed the witness to produce and submit to you that report which sets forth and reflects any materiality to his direct testimony. I understand they do have that information here for you. Of course you asked for the entire report, right ?

MR. DAVIDOFF: That's right, Your Honor.

THE COURT: It's being limited to that portion that's material to his direct testimony and nothing else. I am directing them

to furnish you with a copy of that report. Do you understand that ?

MR. GELLMAN: It has already been furnished.

THE COURT: You have an exception then for the Court's denial to let you look at the entire report.

MR. DAVIDOFF: I would like the record to indicate I was not given an opportunity to look through the main report and it's an excerpt what was given to me, I was not shown any report.

THE COURT: Right.

MR. DAVIDOFF: I would also in order we may keep it straight, I was given those pieces of paper here by Mr. Gellman and I would request they be marked for identification.

THE COURT: They may be marked, I might also point out you wanted the entire report and you thought it was material. There's a procedure if it's not exempt under the law and that would be a subpoena. However, you requested it here after this witness' direct testimony and its limited to any matters to his direct testimony. That's the direction of the Court. I cannot direct the entire report be furnished to you.

MR. DAVIDOFF: I take exception to the Court's ruling.

THE COURT: You have an exception.
State Police Report marked Defendant's Exhibit E for identification.

State Police Report marked Defendant's Exhibit E for Identification."

(c) Attached hereto and made a part hereof and marked Exhibit "B" is a copy of the entire direct and cross-examination of INVESTIGATOR BROWN, from the transcript of the trial.

(d) The refusal of the trial court judge to allow Petitioner's counsel

the right to inspect and to use for the purposes of the cross-examination of INVESTIGATOR BROWN, the notes and written report of his investigation, (after he had been called as a witness on behalf of the PEOPLE and had given testimony on their behalf and had admitted that he had prepared a written report and submitted a written report to his superiors and had referred to that written report within a month of his testifying and refreshed his recollection at the trial and after the written report had been produced at the time of trial) was a violation of Petitioner's Constitutional Rights and a denial of due process of law as guaranteed by the 6th and 14th Amendments of the Constitution of the United States.

(e) Petitioner has conferred with his attorney and upon information and belief, is advised that the United States Supreme Court in JENCKS v. THE UNITED STATES, 353 U.S. 657, specifically reviewed this question and citing GOLDMAN v. THE UNITED STATES, 316 U.S. 129, stated at page 668 as follows:

"This Court held in Goldman v. United States, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness "...does not use his notes or memoranda (relating to his testimony) in court..." We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see

them to determine what use may be made of them. Justice required no less."

(f) The New York State Court of Appeals, in PEOPLE v. ROSARIO, 9 N.Y. 2d 286, 173 N. E. 2d 881, 213 N.Y.S. 2d 448, citing as its authority, JENCKS v. THE UNITED STATES (supra), stated as follows at page 289:

"That a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination."

(g) The Court of Appeals of the State of New York in PEOPLE v. MALINSKY 15 N.Y. 2d 86, reaffirmed its position as stated in PEOPLE v. ROSARIO, (supra) by saying at page 90:

"As to the later contention, the Court is of the opinion that Detective Sullivan's notes should have been turned over to the defendants for their inspection and possible use. We made it unmistakably clear in People v. Rosario (9 NY 2d 286) that defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, provided only that the statement "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential" (p. 289). And, obviously, it matters not whether the witness is testifying upon a trial or at a hearing. In either event, "a right sense of justice" entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion."

(h) The refusal of the trial judge to grant your Petitioner's counsels request to examine the notes and written report of INVESTIGATOR BROWN, when it was produced in court and available, was a deprivation of his Constitutional Rights as provided in the 6th Amendment of the Constitution as to confrontation and cross-examination of witnesses, and Petitioner was denied the due process of law as guaranteed by the 14th Amendment of the Constitution of the United States.

6. Petitioner was further deprived of his Constitutional Rights and is being held pursuant to a conviction which was obtained without due process of law and in violation of the 14th Amendment as follows:

(a) The overwhelming amount of testimony produced at the trial against your Petitioner was testimony illicit from the co-defendant, DELOIS HARDEN, and it is quite clear that without DELOIS HARDEN'S testimony, the only testimony against your Petitioner would amount to isolated assaults against the deceased, and would in no way be sufficient to sustain the conviction for murder.

(b) Both your Petitioner and DELOIS HARDEN were indicted for the crime of murder by indictment of the Sullivan County Grand Jury dated the 29th day of February, 1972. A severance was granted by the Sullivan County Court and your Petitioner's case was scheduled to, and did, commence by the selection of a jury on the 16th day of May, 1972. On the 12th day of May, 1972, four days prior to the date set for the commencement of your Petitioner's case, DELOIS HARDEN pleaded guilty before the Sullivan County Court Judge to a reduced charge of assault in the first degree and sentencing was adjourned until the 12th day of June, 1972, a date which would have been after the commencement and

anticipated completion of your Petitioner's trial.

(c) Attached hereto and made a part hereof as Exhibit "C" as if fully set forth herein at length, is a copy of the transcript of the proceedings on the 12th day of May, 1972, when DELOIS HARDEN entered her plea of guilty to the reduced charge. During your Petitioner's trial, and after DELOIS HARDEN had testified on direct examination as to the alleged beatings and other acts of your Petitioner against the deceased, DELOIS HARDEN was cross-examined in regard to her entry of the plea of guilty to the reduced charge of assault in the first degree, and more specifically as to her conversations with the District Attorney and the circumstances giving rise to her entering a plea of guilty to a reduced charge only four days prior to the inception of your Petitioner's trial.

(d) Set forth below is a copy of a portion of the Cross-examination of DELOIS HARDEN, from the transcript of the trial. (Transcript-Page 167-172)

TRANSCRIPT-P. 167-172

"Q. Did you have a conversation with anyone prior to coming into Court here as to your testimony that you gave the last couple of days ?

A. Did I have a conversation ?

Q. Did you discuss your testimony prior to coming in here ?

A. No, I didn't discuss my testimony.

Q. Did you have a meeting or did you have a conversation in the Grand Jury room within the last two weeks with anyone in regard to your testifying here today ?

A. No.

Q. You know where the Grand Jury room is in this building ?

A. Upstairs I believe.

Q. Now, within the last two or three weeks did you go up to the Grand -- were you taken up to the Grand Jury room or a room on the second floor of this building and have any conversation with any members of the District Attorney's Office in regard to your testifying here ?

A. District Attorney ? I had a meeting with the District Attorney, he asked me to tell the truth and I told him the truth.

Q. And that was on the second floor up here ?

A. Not in the Grand Jury room.

Q. Well, it's on the second floor in one of the rooms ?

A. Yes.

Q. And you had a conversation at that time ?

A. Not a conversation. Yes, I was asked questions and I was answering them.

Q. And was that conversation reduced to writing to your knowledge ?

A. No, it was not.

Q. You weren't asked to sign anything as a result of that ?

A. No, I was not.

Q. Was that prior to your pleading guilty - was that prior - was that before you pleaded guilty to assault in the first degree ?

A. Yes, it was.

Q. And it was after you were indicted for murder ?

A. I don't understand what you mean.

Q. That incident in which you had a discussion with the District Attorney was that after you had been indicted for murder ?

- A. Yes, I believe so.
- Q. And before you pleaded guilty to the reduced charge of assault ?
- A. No, I believe it was after. I had a meeting before but I believe it was after I seen him again and I told him the truth.
- Q. Was that meeting before last Friday ?
- A. No. I had a meeting with him the other day.
- Q. AND what day was that ?
- A. I believe it was Monday.
- Q. That would be --
- A. No, it was Tuesday, Tuesday.
- A. Tuesday of this week ?
- Q. Yes.
- A. And prior to your meeting on Tuesday of this week with the District Attorney upstairs you had never met with the District Attorney upstairs or any other place ?
- A. Yes, I've seen him before.
- Q. When was that ?
- A. You asked me when was my last meeting.
- A. No, I don't believe that's what I asked. I'm just asking did you have any meeting with the District Attorney anywhere in regard to these incidents after you were indicted for murder and before you pleaded guilty to assault ?
- A. Yes.
- A. And when was that ?

A. I can't give you the exact date.

Q. At that meeting did you discuss these incidents in which you have testified to ?

A. He asked me to tell him the truth and I told him the truth.

Q. And at that time you discussed these incidents, is that true ?

A. I didn't discuss, he asked me and I told him.

THE COURT: Did you tell the District Attorney about this at the time he asked you to tell the truth, did you tell it to the District Attorney ?

A. Yes, he asked me questions, yes.

THE COURT: And you told him some things about this ?

A. Yes.

THE COURT: All right. She did tell him.

Q. Was that the first time that any member of a law enforcement agency had asked you questions about what George Foye had done to Michael Harden ?

A. What do you mean, policeman, something like that ?

Q. Right ?

A. No, not really, just except when I got arrested when we was down at Middletown but he asked me questions.

Q. Did he ask you questions at that time as to George Foye's conduct towards Michael Harden ?

MR. GELLMAN: Who you talking about now, Mr. Davidoff ?

MR. DAVIDOFF: She said some--

THE COURT: Can't you specifically put in your question who you are talking about ? Are you talking now about a police officer in Middletown ?

MR. DAVIDOFF: Yes.

THE COURT: Did a police officer in Middletown at the time you were arrested ask you questions about this matter ?

A. No, he just asked me a couple of questions was George staying with me and that was all.

THE COURT: He asked you some questions, right ?

A. Yes.

THE COURT: All right. Next question.

Q. Did he ask you anything about what George Foye did to Michael Harden ?

A. No.

Recess. Court reconvened."

DELOIS HARDEN further stated, as follows: (Transcript-Page

182-187)

TRANSCRIPT-P. -182-187

"Q. Have you been sentenced yet ?

A. No.

Q. And when is your sentencing, do you know ?

A. June 12th.

Q. Were you subpoenaed here today ?

A. No.

Q. Did you voluntarily come into Court here today to testify ?

MR. GELLMAN: Now, Your Honor, I object to this.

THE COURT: Over ruled. She may answer.

A. Yes, I came voluntarily.

Q. And did you tell somebody that you would voluntarily come here today to testify ?

A. No.

Q. You never told anybody that you would voluntarily come here today to testify ?

MR. GELLMAN: Isn't that exactly what was asked and answered in the previous question, did you ask, and now you say you never asked, I object to this, Your Honor.

THE COURT: What's the question I'm concerned with now ?

Question repeated.

THE COURT: I'll sustain it because of the form. Rephrase it.

Q. Did anybody ask you to come here today to testify ?

A. No.

Q. Who brought you here today to testify ?

MR. GELLMAN: Object to this, Your Honor ?

THE COURT: Well, why do you object to that ?

MR. GELLMAN: First of all, what's the pertinency of who brought her here ? The fact that she's here testifying, isn't that sufficient in telling the story ?

THE COURT: I think he has a right to inquire how she got here. Over ruled. Who brought you here, if anybody brought you here ?

A. The Sheriff's Department matron.

THE COURT: The Sheriff's Deputy over here at the jail ?

A. Yes.

THE COURT: All right.

Q. Did you ever ask anyone in the Sheriff's Department to bring you over here to testify ?

A. No, I didn't ask anybody.

Q. Did you know that you were coming over this week to testify ?

A. Yes.

Q. How did you know ?

A. The D.A. told me I would probably come over here to testify one day this week.

Q. So the District Attorney told you you were coming over here to testify ?

A. Yes.

Q. And when was this that he told you this ?

A. When I seen him Tuesday.

Q. And that was after you plead guilty ?

A. Yes.

Q. And the time when you saw him prior to your pleading guilty did you have any conversation at that time in regard to your coming here to testify ?

A. Did--I don't understand what you mean.

Q. There was a time prior to your pleading guilty in which you had a conversation with the District Attorney, is that correct ?

A. Yes.

Q. And did he tell you at that time that he would have you testify at the trial of George Foye ?

THE COURT: Mr. Davidoff, aren't you getting into a matter now that is not a proper phase of this interrogation ?

MR. DAVIDOFF: I believe it is, Your Honor.

THE COURT: How can the District Attorney tell a defendant charged with murder to come in and testify ? I don't understand this type of cross examination you are conducting here.

MR. DAVIDOFF: Your Honor--

THE COURT: You are asking now whether the District Attorney asked a person who's charged with murder whether he asked her to come in and testify, a defendant in the case, is that what you are asking ?

MR. DAVIDOFF: A co-defendant.

THE COURT: No. Do you want to let him go into it, you may ?

MR. GELLMAN: I object. There is no co-defendant because this action was severed by Mr. Davidoff himself, only a co-defendant originally, he made the application for a severance.

THE COURT: Whether it's a co-defendant or not the District Attorney has no right to ask anybody who's charged with a crime before the case is disposed of to testify.

MR. DAVIDOFF: Your Honor, I don't know what occurred. I'm asking here--

THE COURT: Go ahead, I'll let you ask it, I don't see what it has to do with it but go ahead.

Q. You had--

THE COURT: What's your question now ? Don't make any statements, rephrase your question. Let's get down to the rules of evidence. I've given you enough latitude.

Q. During your conversation with the District Attorney prior to your pleading guilty after you were indicted for murder did you discuss the fact that you would testify at the trial of the defendant George Foye ?

A. Not while I was indicted for murder, no.

Q. When did you discuss it ?

MR. GELLMAN: Hasn't this been asked and answered ?

was vague and non-responsive when inquiry was made as to her conversations with representatives of the District Attorney and when these conversations occurred. The Assistant District Attorney made no attempt to explain to the court or to the jury that DELOIS HARDEN was cooperating with the District Attorney's Office, and as to whether or not in reward for her testimony, that some consideration would be given to DELOIS HARDEN at the time of sentencing. In actuality, there was a reward given to DELOIS HARDEN by the court at the time of sentencing for her cooperation with the District Attorney's Office, Attached hereto and made a part hereof, as if fully set forth herein at length and marked Exhibit "D" is a transcript of the proceedings in the Sullivan County Court on the 7th day of August, 1972, at which time DELOIS HARDEN was sentenced. At DELOIS HARDEN'S sentencing, the Assistant District Attorney, the same Assistant District Attorney who was the prosecutor at your Petitioner's trial, stated to the Court during his remarks upon making a recommendation, stated as follows:

PAGE 2-SENTENCING
OF DELOIS HARDEN

"MR. GELLMAN: Yes, I do, Your Honor. In this particular matter the defendant was originally charged with murder and then subsequently pleaded to assault in the first degree, in violation of section 120.10 of the Penal Law of the State of New York. Our office has thoroughly investigated this matter and based on the proof it was our determination that she was not as guilty of the original crime charged as the co-defendant was. Subsequently this defendant was very helpful to our case, gave us a great deal of information, testified on the trial as to all aspects of what occurred. Based on what we have learned, in the interests of justice we recommend that the defendant receive a sentence,

THE COURT: I think it has but let him go. Go ahead.

A. That I would testify - it wasn't really discussed until Tuesday.

Q. And it wasn't discussed before Tuesday ?

A. Not that I would testify.

Q. When did you decide to plead guilty to the reduced charge of assault in the first degree ?

MR. GELLMAN: I'm going to object to this, Your Honor.

THE COURT: He may go into it. Over ruled.

A. When did I decide to plead guilty ?

Q. Yes ?

A. I don't remember exactly."

(e) Your Petitioner's counsel specifically directed questions to DELOIS HARDEN in regard to whether or not she had voluntarily come into court to testify against your Petitioner. The Assistant District Attorney prosecuting the case objected to these questions and made no offer to explain how DELOIS HARDEN had been brought to the court to testify when she alleged that she had not been subpoenaed, and when she also alleged that she had not requested that the Sheriff bring her to the court to testify. The continuing objections by the Assistant District Attorney to the inquiry of your Petitioner's counsel when the Assistant District Attorney should have come forth and explained to the Court and the jury as to the circumstances surrounding her plead to a reduced charge and the bringing of DELOIS HARDEN to the court on that particular date to testify, were improper.

(f) As the testimony on previous pages indicates, DELOIS HARDEN

indeterminate sentence, of four years. "(underlining added)

The Court in its remarks at sentencing, at page 5, stated:

"It is important to this court to know that this defendant has cooperated with the prosecution in the case against GEORGE FOYE, who was convicted of murder, and the court feels that that is a very important feature of this case, in so far that the imposition of sentence is concerned. And the defendant should be rewarded to some extent for the cooperation that she gave the District Attorney, and the fact that she appeared and testified in this case, and the court will consider that an imposing sentence." (underlining added)

(g) If the statements of this witness with respect to her conversation with the District Attorney prior to the reduction of the charge against her from murder to assault, were untrue, as Petitioner believes them to be, and in fact the conversations had taken place between the Assistant District Attorney and the co-defendant before the charge against her were reduced concerning her cooperation and testimony at the trial of Petitioner and her statement upon trial were in fact false and incorrect, the Assistant District Attorney had a duty and obligation to bring forth the true facts and circumstances even though such may have impeached the credibility of his own witness. Had her credibility been so impeached on this issue, the jury may very well have disregarded her testimony on other issues resulting in a verdict other than Petitioner's guilty of murder.

(h) It is no coincidence that the co-defendant, DELOIS HARDEN pled guilty to a reduced charge four days prior to the commencement of your Petitioner's trial, and that the imposition of sentencing was delayed until the completion of your Petitioner's trial, and your Petitioner respectfully requests that it was an

obligation upon the District Attorney, at your Petitioner's trial to apprise the court, jury, and your Petitioner's counsel as to any promise, reward, or lienency that the witness was to expect in return for her willingness to take the stand for the prosecution. The failure of the prosecutor to correct the testimony of the witness which he knew to be false, denied your Petitioner due process of law in violation of the 14th Amendment.

(i) Petitioner has conferred with his attorney, and upon information and belief, has been advised that the United States Supreme Court in NAPUE v. ILLINOIS, 360 U.S. 264 at page 269, stated as follows:

"First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Curran v. Delaware, 259 F. 2d 707. See New York ex rel. Whitman v. Wilson, 318 U.S. 688, and White v. Ragen, 324 U.S. 760. Compare Jones v. Commonwealth, 97 F. 2d 335, 338, with in re Sawyer's Petition, 229 F. 2d 805, 809. Cf. Mesarosh v. United States, 352 U.S. 1. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28; United States ex rel. Thompson v. Dye, 221 F. 2d 763; United States ex rel. Almeida v. Baldi, 195 F. 2d 815; United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382. See generally annotation, 2 L. Ed. 2d 1575."

(j) The New York Court of Appeals has recognized the Federal Law and in the case of PEOPLE v. SAVVIDES, 1 N.Y. 2d 554, 557; 136 N.E. 2d 853, 854-855; 154 N.Y.S. 2d 885, 887; stated as follows:

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has

the responsibility and duty to correct what he knows to be false and elicit the truth... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

More recently, the New York Court of Appeals in the case of PEOPLE v. WASHINGTON 32 N. Y. 2d 401, reaffirmed its support of this proposition and stated as follows:

"The prosecutor, who personally had given the assurances to Anderson, took no steps to tell the jury the truth of the matter. Were there no more, we would reverse and order a new trial."

From a review of the sentencing minutes and the circumstances surrounding the plea of guilty entered by the co-defendant, DELOIS HARDEN, four (4) days prior to the commencement of your Petitioner's trial, your Petitioner believes that portions of the testimony of DELOIS HARDEN, the chief witness produced by the People against your Petitioner, was incorrect. Your Petitioner believes that the Assistant District Attorney had knowledge that DELOIS HARDEN was giving untrue testimony and being vague and unable to recollect what he knew to be the facts. The cases cited above clearly indicate that the Assistant District Attorney had a duty and an obligation to bring forth the true facts and circumstances at your Petitioner's trial, even though the true facts and circumstances may have impeached the credibility of his own witness. The failure of the Assistant District Attorney to comply with his duty and obligation, was a denial of your Petitioner's Constitutional Rights as protected by the 14th Amendment to the Constitution, and it is respectfully requested that this Court set aside your Petitioner's conviction for the crime of murder.

WHEREFORE, Petitioner prays:

1. That a Writ of Habeas Corpus be directed to the Respondent issued in his behalf so that the Petitioner may be brought before this court.
2. That the Respondent be required to appear and answer the allegation of this Petition.
3. That, after a full complete hearing of the facts alleged herein, this court relieve Petitioner of the unconstitutional detention, imprisonment, and sentence of death, and that the court grant such other, further, and different relief as to the court may seem just and proper under the circumstances.

DATED: November 20, 1973

S/ George Foye

GEORGE FOYE--Petitioner

MICHAEL DAVIDOFF, ESQ.
Attorney for Relator/Petitioner
Office and P.O. Address
Ten Hamilton Ave., P.O. Box 809
Monticello, New York 12701
Tel. No. (914) 794-5110

STATE OF NEW YORK)
) SS:
COUNTY OF CLINTON)

GEORGE FOYE, being duly sworn, deposes and says:

That he had read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; that the same is true to his knowledge except

as to those matters therein stated to be alleged on information and belief,
and as to those matters, he believes it to be true.

S/ George Foye

GEORGE FOYE

Sworn to before me this 20

day of November, 1973.

S/ Henry G. Briquer

Notary Public

Supreme Court—Appellate Division
Third Judicial Department

April 19, 1973

19513

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

GEORGE FOYE, Appellant.

Judgment, County Court, Sullivan County (Newberg, J.), rendered on
July 12, 1972, affirmed. No opinion.

STALEY, JR., J.P., GREENBLOTT, SWEENEY, KANE and MAIN, JJ.,
Concur.

EXHIBIT "A-1"

State of New York Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

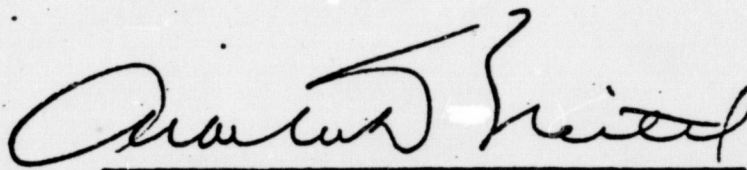
against
GEORGE FOYE,

Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York , New York
June 12 , 19 73



Associate Judge

*Michael Davidoff, Esq.
10 Hamilton Avenue
Monticello, New York 12701

Hon. Louis B. Scheinman
District Attorney, Sullivan Co.
Court House
Monticello, New York

Clerk, Court of Appeals

*Briefs and other papers returned herewith

*Description of Order:

5-3-73 App. Div. 3rd Dept. affmd. 7-13-72 Sullivan Co. Ct.

CLAYTON D. BROWN, being duly sworn, testified as follows:

Direct examination by Mr. Gellman

- Q. Sir, what is your occupation?
- A. I'm an Investigator with the Division of State Police.
- Q. And for how long have you been with the New York State Police?
- A. It will be ten years the 18th of June.
- Q. And where are you stationed?
- A. Ferndale, New York.
- Q. On October 24th, 1971 did you have an opportunity to speak to George Foye?
- A. I did.
- Q. And where did this take place?
- A. At Horton Memorial Hospital in Middletown, New York.
- Q. And where in that hospital did this take place?
- A. It was in a little rest area in one of the hallways.
- Q. What was your conversation, starting at the beginning, what did you say to him and what did he say to you initially?

MR. DAVIDOFF: Objection, Your

Honor.

THE COURT: Over ruled. What's the

date of this?

MR. GELLMAN: October 24th, 1971.

THE COURT: All right. October 24th, 1971. All right.

Q. Is that the correct date?

A. Yes, sir.

Q. Had you ever met George Foye before?

A. No, sir.

Q. How did you know it was George Foye that you spoke to, did he identify himself to you?

A. I identified myself to him and he told me his name was George Foye.

Q. Can you identify George Foye at this time?

A. Yes, the gentleman sitting there.

Q. Sitting next to Mr. Davidoff at the table?

A. Yes.

Q. Now, please tell us what your conversation was at that time--

MR. GELLMAN: I'll withdraw it.

Q. What time did this occur?

A. Approximately 9:30 P.M.

Q. Go ahead, tell us what was said?

A. I advised Mr. Foye he did not have to say anything, anything he said could and would be used against him in a court of law, he had the right to have an attorney present during any questioning, in the event he could not afford an attorney an attorney would be appointed for him free of charge. I

then asked him if he understood what I told him and he said, "Yes."

Q. Anything else?

A. I asked him if he wanted an attorney present, he said he didn't need one.

Q. Did you then have a conversation with him?

A. I did.

Q. What did you say to him and what did he say to you at that time?

A. I asked him what had caused the condition of Michael Harden he was presently in the hospital there at Horton.

Q. And?

A. He told me that he had been sleeping on the couch and that he had been awoken by Delois Harden and she told him that Michael had fell against the radiator and become unconscious.

Q. Did you have any further conversation with him?

A. I asked him what accounted for the old bruises on the child's body, he related that he had disciplined the child with his hands and a belt.

Q. Did you ask him on how many occasions this occurred or when it occurred?

MR. DAVIDOFF: Objection, Your Honor, leading and suggestive.

THE COURT: Sustained.

Q. Did you ask him any further questions concerning this?

A. I asked him how long he had been living with Delois Harden, he related approximately two and a half years.

Q. Did you have any other conversation other than what you have given us relating to George Foye and Michael Harden?

A. I asked him why he had disciplined the child with his hands and the belt, he related that the child didn't do as he was told.

MR. GELMAN: No further questions.

Cross examination by Mr. Davidoff

Q. Investigator, did you testify at the Grand Jury?

A. I did.

MR. DAVIDOFF: I ask that the Grand Jury testimony be produced of this witness, Your Honor.

THE COURT: All right.

Q. Investigator, did you make a report--

MR. DAVIDOFF: Strike that.

Q. Were you in charge of the investigation into the death of Michael Harden?

A. Yes, sir.

Q. And you along with another Investigator from the B.C.I. conducted almost the entire investigation?

A. That's correct, sir.

Q. And did you write up a report as to your investigation?

A. I did.

Q. And was this report which was written up in the regular course of writing up your reports?

A. That's correct.

Q. And this is a report which is submitted to your superior?

A. That's right.

Q. Did this contain all the notes that you had made and all the results of your investigation?

A. It's the entire result of the investigation.

Q. Was this submitted to your superiors?

A. It was.

Q. Where is that submitted to?

A. Albany, New York.

Q. Is a copy of that report kept in files here in Ferndale?

A. There's a copy in the building, the final disposition folder at the Ferndale barracks.

Q. And did you review this folder within the last month?

A. Yes, I would have read it over.

Q. And that contained the same things which you have testified to today, were those things also contained in that folder?

A. Probably not verbatim.

Q. But the notes on what you have testified to today would that be in that report?

A. Yes, it would be.

MR. DAVIDOFF: Your Honor, I ask that that report be produced.

MR. GELMAN: Now, Your Honor, we have been on trial since last Tuesday and this case has been going on for some period of time. The proper procedure for obtaining records-

MR. DAVIDOFF: Objection, Your Honor. I would ask we discuss this outside the jury.

MR. GELLMAN: I don't see why I can't answer it.

THE COURT: Let's get down to the realistic situation instead of discussing the legal aspects of it. Is this report available and can it be produced?

MR. GELLMAN: You have to ask the witness, I don't know.

A. The report is in the folder at the Ferndale barracks.

THE COURT: That can be produced at some subsequent time?

A. Right.

THE COURT: You have no objection? Do you have a right to under your authority? If the Court orders me, sir, I have to, I'm not going to be in contempt of court.

THE COURT: You can do it some other time.

MR. DAVIDOFF: May I make this suggestion, Your Honor, if possible the report could be produced during lunch and I can look at it during lunch.

THE COURT: We'll take that up after lunch.

MR. DAVIDOFF: I have a right to

look at it during lunch.

THE COURT: If we have it here.

I don't want to talk about the proper procedure but if you wanted that here you could have subpoenaed it.

MR. DAVIDOFF: Your Honor, the last time it was here.

THE COURT: We are giving it for you. If he's willing to produce it you have an opportunity to look at it during lunch and you can examine it after lunch. Now go on with other aspects of your cross examination, if you have any.

Q. Investigator Brown, did you have a conversation on the night of October 24th, 1971 with anyone else?

A. Yes, I did.

Q. And who was that with?

A. Delois Harden.

Q. And where was that conversation?

A. In the same area in the Horton Memorial Hospital in Middletown, New York.

Q. Was that conversation prior to the conversation with George Foye?

A. It was.

Q. Why were you down at Horton Memorial Hospital on

that evening?

A. I had been advised by the Monticello Police Department of a possible child abuse case.

Q. And who advised you?

A. Sgt. Bisland.

Q. And what exactly did Sgt. Bisland tell you?

A. That there had been a report to his Department of a possible child abuse case.

Q. And his Department called your's?

A. That's correct.

Q. And therefore you went down there with the idea of investigating a possible child abuse case?

A. That's correct.

Q. And prior to going down to Horton Memorial Hospital did you go anywhere else?

A. After I received the call from the Police Department?

Q. Right?

A. No.

Q. And did you go down there alone?

A. No.

Q. Who did you go down with?

A. Investigator Topping.

Q. Prior to going down there had you made any calls to any other members of the State Police?

A. I had.

Q. And who was this?

A. Investigator Catazone.

Q. And you told him to meet you there?

A. I asked him to go to the hospital and check on the condition of the child.

Q. And in fact when you got down there he had arrived before you?

A. He was at the hospital.

Q. Did you have any conversation with that Investigator prior to your talking to either Delois Hardon and George Foye?

A. I asked him the condition-

Q. Did he tell you the condition of the child?

A. He said the child was up in the operating room.

Q. Did you have any conversations with any of the nurses or doctors prior to talking to Delois or George?

A. Yes, I spoke to what I believe was the head nurse on duty.

Q. And what was the essence of that conversation?

A. She merely reported--

MR. GELLMAN: Object to this,
Your Honor.

THE COURT: I can understand where it would be hearsay as far as his defendant but if he's asking it--

MR. GELLMAN: All right. I withdraw my objection.

Q. Did you discuss the condition of the child?

A. I asked the condition of the child, yes.

Q. Did you ask anything about the parents at that time?

A. She related that they were in the waiting room.

Q. And is that how you knew to go to the waiting room?

A. Right.

Q. When you went to the waiting room which parent did you speak to first?

A. Delois Harden.

Q. And was George Foye present when you spoke to Delois Harden?

A. When I first spoke to her you mean?

Q. What's the first thing you said--

MR. DAVIDOFF: I withdraw that.

Q. Who was the first one you spoke to, Delois Harden or George Foye?

A. Delois Harden.

Q. Was George Foye present?

A. He was.

Q. What's the first thing you said to Delois Harden?

A. I identified myself.

Q. As Investigator Brown?

A. Yes.

Q. What was the next thing you said?

A. And I introduced Investigator Topping.

Q. And then what?

A. I asked Delois Harden if she would talk to me about the condition of the child.

Q. And what did she say?

A. She said, "Yes."

Q. Did you then have a conversation with Delois Harden?

A. I did.

Q. And was George Foye present?

A. No.

Q. Now, what was your conversation, what did you say to Delois Harden and what did Delois Harden say to you?

A. I advised her that she did not have to tell me anything, anything she said could be and would be used against her in a court of law, she had the right to have an attorney present during any questioning, in the event she could not afford an attorney an attorney would be provided for her free of charge. I asked her if she understood and she said, "Yes", asked her if she wanted an attorney, she said she didn't need one.

Q. Did you then have some more conversation?

A. Right.

Q. What did she say -- what did you say to her and what did she say to you, if anything?

A. I asked her what had happened to her child Michael.

Q. And what if anything did she say?

A. She said she had been I believe it was the kitchen of the apartment preparing a meal, had been advised that Michael had fell against the radiator and struck his head and became unconscious.

Q. Have any further conversation?

A. I asked her relative to the old bruises on the child's body.

Q. What if anything did she say?

A. She said she had beat him with a belt and her hands because he pissed on the floor and shit on himself.

Q. She said that to you on that date? What else?

MR. GELLMAN: Your Honor, why do we have to have this? I object to these statements by counsel. After four days I think we ought to stop it.

Q. What else did you say to her and she say to you?

A. I asked her how long she had been living with George Foye, she told me approximately two and a half years.

Q. Anything else?

A. Not that I can specifically recall.

Q. Investigator, would it be more specific that her answer to you was that when you asked her about the bruises she said she had licked the kid be-

cause he had shit on himself or ploosed on the floor and shit on himself and didn't go to the toilet like he was supposed to, that he didn't do other things that she told him to, would that be more specific as to her answer towards you at that time?

A. Quite possible.

Q. Did you have any discussion at that time with her with regard to any seizures?

A. Yes, I did.

Q. Could you tell this jury what you said to her and what she said to you?

A. I asked her why the child fell into the radiator or something similar to that. She said the child had had seizures since the age of approximately one year old.

Q. She tell you she had struck the child on numerous occasions?

A. I believe the question I asked her was how often she had done this and she said when he performed these acts.

Q. Did she ever tell you she had struck the child on numerous occasions?

A. Her exact wording I wouldn't be able to say.

MR. DAVIDOFF: Your Honor, I ask that this be marked an exhibit B, defendant's exhibit B.

THE COURT: It may be marked.

Copy of Supporting Deposition
marked Defendant's Exhibit D for Identification.

MR. DAVIDOFF: I would like a
moment, Your Honor.

THE COURT: All right.

MR. DAVIDOFF: Your Honor, I
would like to amend that request about having
this marked, this was a copy in my file, I see
there's the original here, could I have the original
marked instead?

THE COURT: I guess so.

MR. DAVIDOFF: Can I take it
out of here, Your Honor?

THE COURT: Why don't you
mark the original and use the copy. Is that a
photostatic copy?

MR. DAVIDOFF: All right, mark
the original. You have no objection, have you,
Mr. Gellman?

MR. GELLMAN: I have no objec-
tion. I don't even know what he's doing, Your
Honor.

THE COURT: Mark the original
and you can use the copy, Mr. Davidoff.

Q . Investigator, I ask you to look at defendant's
exhibit D and ask you to please look at that.

MR. GELMAN: Excuse me. Didn't you mark the Grand Jury testimony as exhibit D7?

MR. DAVIDOFF: I didn't mark it as anything.

MR. GELMAN: Oh, I'm sorry.

Q. Investigator, would you tell us what that is?

A. This is a supporting deposition which supports an accusory instrument.

Q. And do you recognize -- have you ever seen that before?

A. Yes, I signed it.

Q. And is that -- does that contain your statements?

A. Yes.

Q. Now, does that refresh your recollection as to whether or not Delois Harden ever told you that she struck Michael Harden on numerous occasions?

A. I believe I testified to the fact that she said she had done this on occasion when he didn't do as he was told or shit and pissed on himself.

Q. My question to you, Investigator, was does that refresh your recollection that Delois Harden told you that she struck Michael Harden on numerous occasions?

A. Yes.

Q. She did. Did you ask her at the time any questions in regard to the old bruise on Michael Harden?

A. Yes, that's where I received this response.

Q. That's when you received that response to the question?

A. Yes.

MR. GELMAN: Now, Your Honor, do we have to have repeating again, it's exactly what the witness says. I don't understand it. I object to it.

THE COURT: I think he's answered the question hasn't he? We have arrived at that hour where I guess we are not as alert. What's your question?

Q. Did you have--

THE COURT: What was your last question? Was that answered and answered?

MR. DAVIDOFF: My last question I believe, Your Honor, was that the response given at the time when he asked her questions as to the old bruises.

THE COURT: Yes, he said that's when the answer was given, right?

A. Yes.

THE COURT: Next question.

Q. Did you have any conversations at this time with Delois Harden in regard to the actions of George Foyo?

A. I asked her if Mr. Foyo had disciplined the

child, yes.

Q. And what if anything did she tell you?

A. She didn't want to talk about it.

Q. Did you ask her any other questions in relation to the actions of George Foye?

A. I asked her how long she had been living with Mr. Foye.

Q. Did she ever tell you Mr. Foye beat Michael Harden?

A. During this conversation?

Q. ?During this conversation?

A. No.

Q. Did she ever tell you during this conversation she was afraid of George Foye?

A. No.

Q. Did she ever tell you during this conversation that George Foye struck her?

A. No.

Q. Did she ever tell you George Foye threatened her?

A. No.

Q. Did she ever tell you the defendant did anything at all to Michael Harden?

A. No.

Q. Investigator, I ask you to please look at People's exhibit two which is in evidence. Have you ever seen that before?

A. Yes, I have.

Q. And tell us when you first saw it--

MR. DAVIDOFF: I withdraw that

question.

Q. Tell us who gave it to you?

A. Delois Harden.

Q. And was that when you arrested Delois Harden?

A. That's correct.

Q. What did you arrest Delois Harden for at that time?

A. Endangering the welfare of a child/

Q. And upon a question by you did Delois Harden give you this belt?

A. She did.

Q. Was this belt ever sent--

MR. DAVIDOFF: I withdraw that.

Q. Was this belt within your custody and possession since the time of your arrest of Delois Harden other than when it may have been used for different Court purposes?

A. It's been in the evidence locker at the Ferndale State Police Barracks.

Q. Under your control?

A. State Police control.

Q. Well, you are the one in charge, Investigator?

A. Right.

Q. And you would be the one who had to go and take it out when it was necessary?

A. That's right.

Q. Did you ever send it to the State Police laboratory in Albany to be analysed?

A. I did not.

Q. Did you ever check and see whether there were any--

MR. DAVIDOFF: I withdraw that.

Q. Did you ever have the belt checked to determine whether or not there were any blood stains or other things involved on the belt?

A. No, I did not.

Q. You didn't check it yourself?

A. No.

Q. Did there come a later time when you arrested Delois barden for another crime?

A. After the 25th?

Q. Yes?

A. Yes.

Q. And for what crime was that?

A. Manslaughter in the first degree.

Q. And when did you arrest her?

A. January 12th, 1972.

Q. And was that because of the incident arising out of this same thing which we are talking about?

A. That's correct.

Q. Now, prior -- now, between the time in which you arrested her the first time on October 25th for endangering the welfare of a minor--

A. Endangering the welfare of a child.

Q. And up until the second time that you arrested her, other than the fact that Michael Harden died, did any other information come to your knowledge regarding the investigation of this case?

A. No.

Q. I'm sorry?

A. Not that I recall, no.

Q. Now, it's true you also arrested George Foye on October 24th, is it not?

A. Yes, it is. No, that's not true.

Q. 25th. And you arrested George Foye on October 25th for what crime?

A. Endangering the welfare of a child.

Q. Did you arrest him at another time?

A. Yes, I did.

Q. And that was in the month of January?

A. No, I did not arrest him.

Q. Were you requested though to -- did you have anything to do with the arrest of George Foye in January, 1972?

A. I returned him here from the State Police, Tarrytown, New York.

Q. You were in charge of the investigation of the death of Michael Harden, is that correct?

A. Correct.

Q. And in between October 25th, 1971 when you

- arrested George Foye and in January 1972 when you went down to get him what was the charge then?
- A. Manslaughter in the first degree.
- Q. Now, between these two dates other than the death of Michael Harden was there any other information which came your way concerning this incident which we are discussing?
- A. Not that I recall.
- Q. Now, under whose -- the deposition which supported the charge of manslaughter in the first degree, was that signed by you?
- A. That's correct.
- Q. And under whose request was that deposition signed and filed?
- A. I don't believe I understand the question.
- Q. Did you have a conversation with somebody in regard to filing that deposition charging George Foye and Delois Harden with manslaughter in the first degree?
- A. That was discussed with my superiors and the District Attorney of Sullivan County.
- Q. And it was after you had these discussions with the District Attorney that you filed the information?
- A. You mean the supporting deposition?
- Q. The supporting deposition which backed you up,

the information?

A. The supporting deposition was filed on the 18th day, the original date of the preliminary hearing.

Q. That was filed after then the information was requested by a Judge, is that correct?

A. After the accusory--

MR. GELMAN: I don't know if a Judge requests an information. I say it's improper and probably never happened.

MR. DAVIDOFF: I withdraw it, Your Honor, if that's what he said.

Q. There came a time in January, 1972 when you went before a Judge and requested that he issue a warrant for the arrest of George Foye and Delois Harden for the charge of manslaughter in the first degree?

A. That's correct.

Q. And at your request did the Judge issue that warrant?

A. On the filing of an accusory instrument.

Q. Who filed that accusatory instrument?

A. I did.

Q. And then later on there came a time when you filed a deposition which supported that instrument?

A. That's correct.

Q. Now, prior to this time in between October 25th, 1971 when you had arrested George Foye and Delois Harden on those prior charges and in January, 1972 when you filed for the warrant did you know--

MR. DAVIDOFF: Strike that.

Q. Was George Foye in jail during that period of time?

MR. GELLMAN: Objection, Your Honor.

THE COURT: What's that got to do with the arrests?

MR. DAVIDOFF: I think it's pertinent, Your Honor.

THE COURT: Objection, sustained. I think at this time, ladies and gentlemen, we will recess for lunch.

Court adjourned until 2:30 this afternoon.

Court reconvened at 2:30 P.M.
Defendant in Court.

THE COURT: All right, Mr. Davidoff.

MR. DAVIDOFF: Your Honor, at this time I would like to renew my request that I be provided with the report made by the witness, State Police report.

THE COURT: Well, as I understand

it I directed the witness to produce and submit to you that report which sets forth and reflects any materiality to his direct testimony. I understand they do have that information here for you. Of course you asked for the entire report, right?

MR. DAVIDOFF: That's right,
Your Honor.

THE COURT: It's being limited to that portion that's material to his direct testimony and nothing else. I am directing them to furnish you with a copy of that report. Do you understand that?

MR. GELLMAN: It has already been furnished.

THE COURT: You have an exception then for the Court's denial to let you look at the entire report.

MR. DAVIDOFF: I would like the record to indicate I was not given an opportunity to look through the main report and it's an excerpt what was given to me, I was not shown any report.

THE COURT: Right.

MR. DAVIDOFF: I would also in order we may keep it straight, I was given those pieces of paper here by Mr. Gellman and I would

request they be marked for identification.

THE COURT: They may be marked.

I might also point out you wanted the entire report and you thought it was material. There's a procedure if it's not exempt under the law and that would be a subpoena. However, you requested it here after this witness' direct testimony and it's limited to any matters to his direct testimony. That's the direction of the Court. I cannot direct the entire report be furnished to you.

MR. DVIDOFF: I take exception to the Court's ruling.

THE COURT: You have an exception.

State Police Report marked Defendant's Exhibit E for Identification.

State Police Report marked Defendant's Exhibit F for Identification.

Q. Now, Investigator, did you have occasion to speak to a Gloria Jones during your investigation of this incident?

A. I did.

Q. Could you tell us the dates on which you spoke to Gloria Jones?

A. May 4th, 1972.

Q. And did you ever speak to Gloria Jones prior to

that time?

A. No.

Q. Did you know that Gloria Jones lived in the same apartment building as George Foye and Eloin Harden?

A. I did.

Q. Did you know that prior to May 4th, 1972?

A. I did.

Q. And did you know prior to May 4th, 1972 that Gloria Jones was a frequent visitor at the apartment of Harden and Foye?

A. I did.

Q. And you never thought it was necessary to discuss this case with her prior to May 4th, 1972?

A. I didn't discuss it with her prior to May 4th, 1972, no.

Q. Do you have any knowledge whether any other Investigators of the State Police pursuant to your request or otherwise have a discussion with Gloria Jones?

A. To the best of my knowledge, no.

Q. Investigator, did you ever have a discussion with Lee Parham?

A. That's correct.

Q. And when did that occur?

A. I believe the date was February 12th, 1972.

Q. Do you know?

A. It could have been February 10th. It was February 10th.

Q. And did you know that Lee Parham had been present in the apartment of George Foye and Delois Harden on October 24th, 1972 prior to February in 1972?

A. Yes, I found this out I believe the date was February 8th.

Q. That was the first time that you knew that Lee had been in that apartment?

A. Knew that she was the one who was there, yes.

Q. How about Margie Marcel?

A. Never heard of her.

Q. Did you know at any time who was in the apartment on October 24th, 1972 prior to February 10th, 1972 on--

MR. DAVIDOFF: Let me withdraw that question.

Q / Prior to February of 1972 did you at any time know who had been present in the apartment on October 24th, 1971 prior to the time when Michael Harden was rushed to the hospital?

A. I was told a subject by the name of Marge Manso.

Q. Manso?

A. That's how it was pronounced to me, yes.

Q. Did you make any attempt to locate that subject?

A. Yes, sir.

Q. Did you have any success?

A. Yes, I located her on February 10th.

Q. So what you are saying that between--

MR. DAVIDOFF: I withdraw that question.

Q. Between October 24th, 1971 and February 10th, 1972 did you make any investigation into this matter by investigating witnesses or other people?

A. Yes.

Q. Can you give me a list of those people who you spoke to?

A. Clarence Williams, Ione Kelly, Elizabeth Roberts, Eva Roberts, Patricia Hanion, Lorraine Harden, and one who lived at 392 Broadway but at this time I can't recall her name.

Q. Investigator, do you know if any of those were present in the apartment with George Foye and Delois Harden on October 24th, 1971?

A. Did I know that on October 24th or do I know that now?

Q. Do you know now whether any of those people that you just mentioned were present on October 24th, 1971 in the apartment of George Foye and Delois Harden?

A. Magdalene Trato and Ann Lee Parham.

Q. When was the first time that you knew Ann Lee Parham was present in the apartment?

MR. GELLMAN: Your Honor, I'm going to object to this.

MR. DAVIDOFF: I know I asked it before but I'm not clear on the response on my previous question, maybe I misunderstood myself.

THE COURT: Let him answer it. Do you remember when you first found out that this Parham allegedly was in the apartment?

A. First time I had positive information of this, Your Honor, was I believe the date was February 8th, 1972.

Q. Did you have information prior to that time which led you to believe she might have been in the apartment on that day?

MR. GELLMAN: Your Honor, what's the purpose of this?

THE COURT: I don't know either.

MR. GELLMAN: I object to it.

THE COURT: Sustained.

Q. Did you ever ask--

MR. DAVIDOFF: Strike that, Your Honor.

Q. Now, when you questioned George Foye on October 24th, 1971 what did he tell you had occurred at

that time?

MR. GELMAN: Judge, didn't we go through that this morning on cross examination completely, complete conversations he had with George Foye.

MR. DAVIDOFF: No, not on cross examination, Your Honor.

THE COURT: All right. You may inquire.

A. Could I have the question repeated please?

Question repeated.

A. He related that he had been sleeping on the couch at the apartment at 17 Pelton Street and had been awoken by Delois Harden and advised that Michael Harden had fell against the radiator and become unconscious.

THE COURT: Didn't you go into that, Mr. Davidoff?

MR. DAVIDOFF: No, Your Honor, I don't recall.

MR. GELMAN: Your Honor, may I state I remember this testimony.

THE COURT: I do too, but go ahead. What's the next question?

Q. Did you ask George Foye anything about how the old bruises - anything about the new and old bruises?

MR. GELMAN: Object on the ground it has been asked and answered.

MR. DAVIDOFF: I don't recall asking these questions on cross examination.

THE COURT: I remember you reading from a book and you went into it.

MR. DAVIDOFF: I asked, Your Honor, about Delois Harden, conversation between him and Delois Harden, never as to George Foye.

THE COURT: All right. Read the question back.

Question repeated.

A. I did.

Q. And what did he tell you?

A. That he had disciplined the child with his hands and a belt because he didn't do as he was told.

Q. Did he say he used his hands and a belt?

A. Yes.

Q. And that was in response to a question about old bruises?

A. Right.

Q. Investigator, you recall testifying at the Grand Jury proceedings?

A. I do.

MR. DAVIDOFF: And would you give me the date please, Mr. Gellman?

MR. GELLMAN: February 8th, 1972.

Q. Investigator, do you recall at the Grand Jury proceedings on February 8th, 1972 being asked those questions and giving those answers, "Q--

MR. GELLMAN: What page?

Q. 49. "Q. What was the conversation you had with George Foye? A. I asked him in respect to the bruises on the child the same as I asked Delois Harden and he said on occasion he had to discipline the child when the child did not do as he instructed him. Q. Any further questions, any description of the disciplining, anything else in that conversation? A. No, he did not want to talk about it. Q. So the sum and substance was he disciplined the child when the child did not do what he instructed him and did not say the manner in which he disciplined him? A. No, and in the conversation with both subjects Harden and Foye they stated the child became unconscious from falling against the radiator from what she described as a seizure." Now, do you recall those questions being asked of you and giving those answers?

A. If they are there they must have been asked and I gave the answers.

Q. -- Were they true at the time you gave them?

A. That's right.

Q. Was your recollection better on February, 1972 as regarding the events which occurred in October, 1971 or is it better today in May, 1972?

A. I don't believe I could answer that question.

Q. Was that true when you testified to it February 8th, 1972?

A. To the best of my recollection, yes.

Q. Is your recollection better today or was it better in February?

A. I couldn't answer that.

MR. DAVIDOFF: Your Honor, I ask that defendant's exhibit D which is marked for identification be entered as evidence, this is a copy of it.

THE COURT: Show it to Mr. Gellman. Any objection?

MR. GELLMAN: May I have preliminary on this, voir dire on this?

THE COURT: Yes.

Preliminary examination by Mr. Callman

Q. Now, Investigator Brown, this is a supporting deposition that you signed before the court, is that correct?

A. That's correct.

Q. And there's apparently another page which would indicate the date that was signed?

A. The original is in the file that they had here this morning, Mr. Callman.

Q. I show you the original and ask you if you can identify that?

A. Yes.

Q. And that was signed when?

A. The 18th day of January, 1972.

Q. And this was in support of a charge against Delois Harden and George Foye?

A. Yes.

Q. And at that time was that the only paper that you presented to the court for signing?

A. There was an accusatory instrument.

Q. And was there any other deposition at that time produced?

A. One against Delois Harden and one against George Foye.

MR. GELMAN: I have no objection.

THE COURT: All right, may be

received.

D

Defendant's exhibit D marked in

Evidence.

Cross examination by Mr. Davidoff, con't.

Q. Investigator, do you recall on October 24th asking George Foye whether or not he had disciplined Michael Harden on that particular day?

A. I don't recall, the question probably was asked, yes.

Q. You recall the answer?

A. I believe he replied no. I don't recall asking the question.

Q. Investigator, I show you defendant's exhibit, marked E for identification which I believe is notes from your report, is that not so?

A. That's correct.

Q. I ask you to please take an opportunity to read that over. Investigator, does that refresh your recollection as to whether or not on October 24th you inquired of George Foye whether or not he had disciplined Michael on that particular day and what if anything his response to you was?

A. He replied he had not disciplined him that day. I don't know the exact wording but he related he had not disciplined him that day.

MR. DAVIDOFF: I have no further questions, Your Honor.

Redirect examination by Mr. Gellman

Q. Now, I show you this same defendant's exhibit C for identification and ask you to read this portion.

MR. DAVIDOFF: Your Honor, I object to that, this is not in evidence, I didn't ask him to read anything.

MR. GELLMAN: To himself. All right, I'll withdraw that.

Q. At any time in speaking to George Foye on 10/24/71 did Goye admit striking the child with the belt on previous occasions when the child failed to do as he had been instructed by him?

MR. DAVIDOFF: Your Honor, I object to this.

THE COURT: Didn't he already testify to that on direct examination?

MR. GELLMAN: Not in relation to this exhibit the way it's been read by other counsel, Your Honor.

THE COURT: Objection sustained. He's already testified.

MR. GELLMAN: I have no further questions.

THE COURT: Now, when I sustained the objection I didn't want to preclude you from trying to rehabilitate this witness insofar as any alleged inconsistency in the Grand Jury

testimony is concerned. You want to ask him whether he make a report in that respect which is consistent with his direct testimony you have a right to do it but not on the basis that you put it in.

Q. Now, in the Grand Jury testimony, Mr.--

THE COURT: He's already gone into that hasn't he?

MR. GELMAN: Part of that was read by Mr. Davidoff.

THE COURT: You want to read something else, some other testimony he gave?

MR. GELMAN: I'm referring to that aspect of the testimony that was read to him.

Q. Have you ever made a statement or writing that was different that sets forth that George Foye did strike Michael Harden with the belt?

MR. DAVIDOFF: Objection, Your Honor.

THE COURT: Sustained. In that form the objection is sustained..

MR. GELMAN: I have no further questions.

MR. DAVIDOFF: No questions.

MR. GELMAN: You may step down, Investigator Brown.

COUNTY COURT : SULLIVAN COUNTY

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against

DELOIS HARDEN,

Defendant.
-----X

Present:

HON. BENJAMIN NEWBERG,
Sullivan County Judge.

Appearances:

Hon. Emanuel Gellman, Assistant District Attorney,
appeared for the People.

Hon. Ira Jay Cohen, Public Defender, attorney for
defendant.

The following proceedings were held at the Court
House in the Village of Monticello, Sullivan County, New
York, on the 12th day of May, 1972 at two P.M.

Defendant in Court.

THE COURT: All right, gentlemen, the Court is now ready to record any appropriate remarks relative to this matter. What matter are we talking about?

MR. GELLMAN: Matter of Delois Harden

THE COURT: People against Delois Harden, charged with what?

MR. GELLMAN: The crime of murder.

THE COURT: One count?

MR. GELLMAN: One count, section 125.25, subdivision 2, of the Penal Law.

THE COURT: What's the situation?

MR. GELLMAN: I have discussed this matter thoroughly with Mr. Cohen, the attorney for Mrs. Harden, and based on our investigations in this case and in the interests of justice, the District Attorney's office is moving to reduce the charge against this defendant to assault in the first degree.

THE COURT: When you say/in ^{it's} the interests of justice, that's based upon the evidence that's available in your possession and you feel in the event it was tried possibly that might be the result of a jury's determination?

MR. GELLMAN: Yes, Your Honor.

THE COURT: You have consulted

the disposition of this case I assume with the law enforcement officials and the police officers who were instrumental in investigating this?

MR. GELLMAN: We have.

THE COURT: And this meets with their approval?

MR. GELLMAN: Yes, it does, Your Honor.

THE COURT: As well as the District Attorney's office?

MR. GELLMAN: Yes.

THE COURT: In view of the statement made by the District Attorney and for the reasons contained therein the Court will accept the recommendation and permit the defendant to plead to the charge of assault in the first degree in violation of section 120.10. Now, Mr. Cohen, the District Attorney has addressed the Court, you represent this defendant, are you indicating to the Court on behalf of your defendant, you are making application to permit the defendant to withdraw the not guilty plea and plead guilty to assault in the first degree?

MR. COHEN: That's correct.

THE COURT: And that section is 120.10, subdivision 3. Delois Harden, you want to stand up. How old are you, Mrs. Harden - is that Miss or Mrs.

THE DEFENDANT: Miss.

THE COURT: How old are you?

THE DEFENDANT: Twenty-five.

THE COURT: Now, you are represented by Mr. Cohen, the lawyer, right?

THE DEFENDANT: Yes.

THE COURT: And you have talked this matter over with Mr. Cohen?

THE DEFENDANT: Yes.

THE COURT: And do you fully understand what's going on here and this change of plea application which has been made by your attorney?

THE DEFENDANT: Yes.

THE COURT: You understand that do you?

THE DEFENDANT: Yes.

THE COURT: And you are doing this voluntarily after full consultation with your attorney?

THE DEFENDANT: Yes.

THE COURT: And is it necessary for you to discuss this with your family or isn't that necessary?

THE DEFENDANT: No, I don't think so.

THE COURT: You think you are old enough and aware of the situation to make a decision yourself after you have conferred with your lawyer, is

that right?

MRS. LORRAINE HARDEN: Judge,

Your Honor, I'm the Mother.

THE COURT: You know what's going on here don't you?

MRS. LORRAINE HARDEN: Yes.

THE COURT: Now, you understand that you are waiving your right to a trial by jury by entering a plea of guilty here, you understand that, do you not?

THE DEFENDANT: Yes.

THE COURT: And do you also understand that under your plea of guilty to this charge that you could receive an indeterminate sentence of up to 15 years, you understand that, don't you, you could?

THE DEFENDANT: Yes.

THE COURT: That's what you are liable for?

THE DEFENDANT: Yes.

THE COURT: Now, has anybody made any promises to you of any kind to cause you or induce you to change your plea in this case or are you doing this on your own?

THE DEFENDANT: Yes.

THE COURT: Nobody made any promises to you?

THE DEFENDANT: No.

THE COURT: Now, you have been originally charged with murder, you entered a plea of not guilty to that and you withdraw your former plea of not guilty?

THE DEFENDANT: Yes.

THE COURT: Now, are you pleading guilty now and do you want to plead guilty to assault in the first degree because you are guilty of it and for no other reason?

THE DEFENDANT: Yes, I will plead guilty.

THE COURT: Because you are guilty of it and that's why you are going to do it?

THE DEFENDANT: Yes.

THE COURT: Now, did you between November 24th, 1969 and October 24th, 1971 engage in a course of conduct which included beatings, starvation and other inhuman treatment relating to Michael Harden?

THE DEFENDANT: I'll admit to the beatings but not to the other.

THE COURT: You admit to the beatings which evinced a depraved indifference to human life, right, is that true?

THE DEFENDANT: No.

THE COURT: What are you admitting to? Why are you pleading guilty to assault in the

first degree because you beat the child?

THE DEFENDANT: Yes, because I
have beat him.

THE COURT: And that was during
the period of November 24th, 1969 and October 24th, 1971,
through that period?

THE DEFENDANT: Yes.

THE COURT: Now, how do you
plead to the charge of assault in the first degree, subdivi-
sion 3, in violation of section 120.10, of the Penal Law of
the State of New York, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right. You may
be seated. Now, you are the Mother, right? What's your
name?

MRS. LORRAINE HARDEN: My name
is Lorraine Harden, Grandma.

THE COURT: Grandma what?

MRS. LORRAINE HARDEN: Grandma
Harden.

THE COURT: What's your first
name?

MRS. LORRAINE HARDEN: Lorraine.

THE COURT: You are the Mother
of--

MRS. LORRAINE HARDEN: Delois

Harden.

THE COURT: And she just pleaded guilty to assault in the first degree. You heard that?

MRS. LORRAINE HARDEN: Yes, I heard it.

THE COURT: You know what's going on here?

MRS. LORRAINE HARDEN: Yes, I know what's going on but she's lying.

THE COURT: And this meets with your approval, right?

MRS. LORRAINE HARDEN: She's lying. I don't say I approve. She's scared of him, she's afraid of him.

THE COURT: I'm not talking about him. You know what happened here today?

MRS. LORRAINE HARDEN: Yes.

THE COURT: Ok, you may sit down. I'm going to adjourn the matter for the imposition of sentence to June 12th. Is that all right, with you, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: This matter is adjourned until June 12th at two o'clock for the purpose of imposing sentence. The defendant is remanded to the custody of the Sheriff.

COUNTY COURT : SULLIVAN COUNTY

-X

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DELOIS HARDEN,

Defendant.

-X

Present:

HON. BENJAMIN NEWBERG,
Sullivan County Judge.

Appearances:

Hon. Emanuel Gellman, Assistant District Attorney,
appeared for the People.

Hon. Ira Jay Cohen, Public Defender, attorney for
defendant.

The following proceedings were held at the Court
House in the Village of Monticello, Sullivan County, New
York, on the 7th day of August, 1972 at two p.M.

Defendant in Court.

-74-
EXHIBIT "D"

MR. GELLMAN: We move the
imposition of sentence in the case of the People against
Delois Harden.

THE COURT: Take the pedigree.

The Clerk of the Court administered
the oath to the defendant and took her statement.

THE CLERK OF THE COURT: Have you
show
any reason to/why judgment should not be pronounced against
you?

THE DEFENDANT: No.

THE COURT: All right. Mr.
Gellman, do you have anything to say before I pronounce
judgment?

MR. GELLMAN: Yes, I do, Your
Honor. In this particular matter the defendant was
originally charged with murder and then subsequently
pleaded to assault in the first degree, in violation of
section 120.10 of the Penal Law of the State of New York.
Our office has thoroughly investigated this matter and
based on the proof it was our determination that she was
not as guilty of the original crime charged as the co-
defendant was. Subsequently this defendant was very help-
ful to our case, gave us a great deal of information,
testified on the trial as to all aspects of what occurred.
Based on what we have learned, in the interests of justice we
recommend that the defendant receive a sentence, indeter-
minate sentence, of four years.

THE COURT: Mr. Cohen, to you have anything to say before I pronounce judgment?

MR. COHEN: Yes, sir. I want to thank the District Attorney for his comments and pointing out these things to you.

I know Your Honor is fully aware of the facts of this case not only from this case itself but from the companion case which was tried before Your Honor. In addition to those things that Mr. Gellman pointed out in deciding what your sentence will be I think you should also remember that this defendant has no criminal record, this is the first time she had ever been arrested. She in addition to the incident which was involved in this case has two other children which she has raised in a very decent and good manner since birth.

THE COURT: Where are these children now?

MR. COHEN: They are now--

THE COURT: Welfare Department?

MR. COHEN: Yes, they are with foster parents.

THE COURT: They are with whom, foster parents of the Welfare?

MR. COHEN: Department of Welfare.

THE COURT: Welfare supporting them?

MR. COHEN: Yes. But there was evidence and testimony in this case, Your Honor, that anything, any acts of violence which this defendant might have committed against the child in question were at least partially, if not totally, connected with the ^{do-defendant's} duress and force towards this defendant and there is evidence which indicates that that co-defendant also used force against this defendant and it was in that type of attitude and situation that these acts occurred. I ask Your Honor as I am sure you will to keep these things in mind in taking into consideration the imposition of sentence.

THE COURT: Does the defendant desire to say anything before she's sentenced?

MR. COHEN: No.

THE DEFENDANT: No.

THE COURT: Is it Miss or Mrs.?

Miss.

THE DEFENDANT: Miss.

THE COURT: Miss Harden, how old are you?

THE DEFENDANT: Twenty-one.

THE COURT: Now, this defendant stands before this court convicted of the commission of the crime of assault in the first degree. There's been some reference made here to the indictment which originally charged this defendant with the commission of the crime of

murder in concert with one George Foye. Subsequent to the finding of the indictment the defendant entered a plea of guilty to the charge of assault in the first degree and by her plea of guilty stands convicted of that crime.

Now, this Court does not consider the indictment conviction and the Court is not concerned with the type of charge that the defendant was indicted for. The Court is merely concerned with the conviction and the conviction here is assault in the first degree.

And in approaching this case the Court does not find based upon the proceedings heretofore had that this defendant in any way contributed towards the death of her child. She did, then, of course, the charge in this case would not be assault, possibly murder.

The Court is considering that this defendant is a first offender. The Court is also considering that this defendant is a woman of rather weak character, permitted herself to enter into a relationship with a man that resulted in the negligence of her child and finally resulted in the death of one of her children at the hands of the man she was living with and this man has already been sentenced for that crime of murder.

It is important to this Court to know that this defendant has cooperated with the prosecution in the case against George Foye, who was convicted of murder and the Court feels that that is a very important

feature of this case insofar as the imposition of sentence is concerned. And the defendant should be rewarded to some extent for the cooperation that she gave the District Attorney and the fact that she appeared and testified in this case and the Court will consider that in imposing sentence.

It is the sentence of the Court that this defendant receive an indeterminate term, the maximum of which shall be four years and she is committed to the Department of Correction for the purpose of serving that term.

Miss Harden, when you get out of jail, don't get yourself tied up with these people again who are going to cause you to get in trouble again. You do and the next time you are in difficulty it will be a lot more severe. You are receiving some consideration because of your cooperation with the law and if you obey the law you will find you are much better off than breaking it, so your future is entirely up to you.

All right. The defendant is remanded to the custody of the Sheriff.

MR. COHEN: Thank you.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Relator-Petitioner,

-against-

73-CV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Petitioner was convicted of Class A Felony of Murder of an illegitimate child of the woman he was living with and by whom petitioner had two other children. The infant was four years old at the time of death, and was fathered by another, other than the petitioner. The child was admitted to the hospital and found to be suffering from battered child syndrome that caused death and led to defendant's arrest and to the arrest of the mother, Delois Harden. Both were charged with murder. Petitioner moved for and obtained a separate trial. The mother, Delois Harden, several days before petitioner's trial, pleaded guilty to a lesser charge and she testified at petitioner's trial for the prosecution. Petitioner appealed to the Appellate Division, Third Department, which affirmed without opinion [41 A. D. 2d 902 (1973)]. Leave to appeal to the Court of Appeals

was denied by Judge Breitel. Petitioner has thus shown proper exhaustion of State remedies except possibly as to his last contention which is discussed below. Magistrate Solomon has obtained and furnished to me the bound volume of the Record on Appeal of the Appellate Division, Third Department, Vol. No. 6743 (1973). Such Record contains the appellate briefs also and shall be returned to the Magistrate for return to the State Court. This Court is grateful for this splendid cooperation. The references herein are to the pages of that Record on Appeal.

Petitioner alleges as a main contention in his petition filed in this Court, and prepared by his attorneys who represented him at the State trial and in the appeals, that he was denied due process of law because a State police officer, who made the investigation had made notes of his conversations with petitioner, Miss Harden, and others and had prepared a report which he had filed with the State Police, and that the People's refusal to permit defense counsel to examine the complete report denied him due process of law. Defense counsel was given extracts from the report only to the extent as the Trial Judge ruled that it covered the direct examination of the investigating officer. (R 416-418).

This issue concerns a matter dealing with the admission and production of evidence at the State trial that unless exceptional circumstances are shown cannot form the basis for federal habeas corpus relief. The State Police Investigator testified briefly on direct examination and the Trial Judge had the clear right in his discretion to limit the disclosure of the contents of the broad investigation report for cross-examination purposes. Alleged errors in the

admission of evidence at the trial formed no basis for a collateral attack in federal habeas corpus. The ruling of the Trial Court was in accord with New York Law and the defense had express procedural provisions in that law to move for discovery before trial or to subpoena the report before the cross-examination stage. There is no showing, and I recognize that an examination only would fully inform, that non-disclosure was prejudicial to such extent so as to deprive the petitioner of a fair trial. It is only in such a situation that federal habeas corpus will lie. *Scalf v. Bennett*, 408 F. 2d 325, 330 (8th Cir. 1969). There is no proof evident in this record to suggest deliberate misconduct on the part of the prosecutor for intentional concealment of facts that would be favorable to the defense. Evidence in disclosure must be vital and material to furnish grounds for reversal of a conviction. *Clarke v. Burke*, 440 F. 2d 853 (7th Cir. 1971), cert. den., 404 U.S. 1039 (1972). From my review of the pertinent parts of the record and reading of the State appellate briefs on this point, there is no support for the contention that evidence favorable to the defense was improperly withheld in violation of a constitutional right. See *People v. Rosario*, 9 N.Y. 2d 286 (1961); *United States v. Bonanno*, 430 F. 2d 1060, 1063 (2d Cir. 1970), cert. den., 400 U.S. 964 (1970); *United States v. Miller*, 411 F. 2d 825, 832 (2d Cir. 1969). *Jencks v. United States*, 353 U.S. 657 at 672 (1957), is a federal ruling governing production of relevant statements and reports of government witnesses touching the subject matter of their testimony given at the trial. If this ruling is applicable in this State context, there would appear in my judgment to be no violation by the limitation here of disclosure of the investigator's report. See 18 U.S.C. 3500.

Petitioner further claims violation of due process of law in that the bulk of the incriminating testimony against him was elicited from Delois Harden and such testimony consisted of instances of isolated assaults by petitioner not sufficient to sustain conviction for murder. Such contention amounts to an assertion of insufficient evidence in a State court trial which is not reviewable by habeas corpus. *Freeman v. Stone*, 444 F. 2d 113 (9th Cir. 1971).

Petitioner further contends that after Delois Harden had testified against him, she was cross-examined in regard to the entry of her plea of guilty. Petitioner claims his counsel was not permitted to find out in what manner Miss Harden was persuaded to come to court to testify against him. Such error, if there were any, relates to a collateral matter not sufficient to warrant habeas corpus. Evidentiary mistrials of this kind to rise to a constitutional plane must be material in the sense of being a highly significant factor. *Lawrence v. Wainwright*, 445 F. 2d 281, 282 (5th Cir. 1971). If this line of questioning constituted an error, it related to questions of credibility which are not a proper ground to raise by federal habeas corpus. *U.S. ex rel. Morton v. Mancusi*, 393 F. 2d 482 (1968), cert. den., 393 U.S. 927 (1968).

The contention that Delois Harden's evidence was vague and unresponsive is not a sufficient basis for habeas corpus relief inasmuch as the record discloses testimony of particular instances of beatings by other witnesses. P. 3, Brief for Respondent; see *U.S. ex rel. Griffin v. Martin*, 409 F. 2d 1300, 1302 (2 Cir. 1969).

Petitioner claims that the prosecutor had an obligation to apprise the court and jury of the nature of the promise of leniency which was given Delois Harden to reward for her testimony. In the cross-examination of Miss Harden, defense counsel asked questions relating to her plea of guilty. The record does not indicate defense counsel was prevented from asking further questions in regard to any prosecution promise of leniency and the cross-examination of Delois Harden was very extensive. (R 102-201). Delois Harden, a major prosecution witness, pleaded guilty to assault in the first degree before the trial and the prosecutor recommended a four-year indeterminate sentence to the court after the petitioner's trial.

Petitioner claims that Miss Harden's statements as to the reduction of the charge against her were untrue and the prosecutor had the burden of bringing out the true facts and circumstances. I have examined petitioner's brief and supplemental brief to the Appellate Division, Third Department, in the Record on Appeal and it does not seem that this point was brought directly to the attention of the New York courts. It may be that petitioner has failed to exhaust his State court remedies in this respect, and there is question whether it can be used as a basis for federal habeas corpus. However, it is similar to other claims and considering it on the merits, it is my judgment that from the record it has no federal substance. See U.S. ex rel. Levy v. McMann, 394 F. 2d 402, 404 (2 Cir. 1968). The petition for which the filing fee has been paid is denied and dismissed.

It is so Ordered.

Dated: January 4, 1974
Albany, New York

s/ HON. JAMES T. FOLEY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Relator-Petitioner,

-against-

73-CV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

The petitioner, through his attorney, Michael Davidoff, files an application for a certificate of probable cause in relation to my denial of his petition for habeas corpus by memorandum-decision and order dated January 4, 1974. The notice of appeal from my decision has been filed with the Clerk with a check for \$5.00 to cover the filing fee.

Upon review of such decision, there is enough substance in the points raised to warrant the issuance of the certificate of probable cause. The application for the certificate of probable cause is granted and hereby issues. 28 U.S.C. 2253.

It is so Ordered.

Dated: January 22, 1974

Albany, New York

s/ James T. Foley
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 1040—September Term, 1973.

(Argued May 24, 1974

Decided June 10, 1974)

Docket No. 74-1231

UNITED STATES OF AMERICA ex rel.
GEORGE FOYE,
Petitioner-Appellant,

-against-

J. E. LaVALLE, Superintendent of Clinton
Correctional Facility,

Respondent-Appellee.

Before:

TIMBERS and SMITH, Circuit Judges;
TYLER, District Judge.*

Appeal from a memorandum and order of the United
States District Court for the Northern District of New
York, Foley, Ch. J., denying a petition for habeas corpus.
Remanded for further proceedings.

MICHAEL DAVIDOFF, Esq., Monticello, New York,
Attorney for Petitioner-Appellant.

* Hon. Harold R. Tyler, Jr., of the Southern District of
New York, sitting by designation.

HON. LOUIS J. LEFKOWITZ, Attorney General of
the State of New York, by Jean B. Mechanic,
Deputy Assistant Attorney General, Attor-
ney for Respondent-Appellee.

Tyler, District Judge:

George Foye, convicted of murder of a child in the Supreme Court of New York, Sullivan County, on July 31, 1973, appeals from a memorandum and order of the United States District Court for the Northern District of New York on January 4, 1974, denying his petition for habeas corpus relief. Although we recognize that the district court ultimately may be proved correct in its decision to entirely deny habeas relief, we remand for further proceedings on one issue to be discussed hereinafter.

After his conviction based upon a verdict of the jury and the judgment of the Supreme Court of New York, petitioner's conviction was affirmed by the Appellate Division, Third Department, without an opinion. People v. Foye 41 App. Div. 2d 902 (1973). Leave to appeal to the Court of Appeals of New York was thereafter denied by one judge of that court.

In his petition for relief before the district court, Foye raised a number of issues which Judge Foley dealt with in his aforesaid memorandum and order earlier this year. Petitioner, however, seeks appeal only in respect to his claim that he was denied due process of law because the state trial judge refused to permit defense counsel to examine the complete report filed by a prosecution witness, Investigator Brown of the New York State Police, which included notes of the investigator's conversations with petitioner and his codefendant, Delois Harden. Although the record is not crystal clear in this respect, our examination of the trial minutes indicates that the trial judge ruled that the defense should receive only extracts from that report which, in the judgment of the prosecuting attorney, pertained to the direct examination of Investigator Brown.

As we read the memorandum of the district judge, he denied this aspect of Foye's petition on the grounds that the ruling New York law, see People v. Rosario, 9 N.Y. 2d 286, 213 N.Y.S. 2d 448 (1961); People v. Malinsky, 15 N.Y. 2d 86, 262 N.Y.S. 2d 65 (1965), and that alleged error in not permitting the defense to see the entire Brown Investigative report was in the nature of an evidentiary ruling which would form no basis for federal collateral attack upon a state criminal conviction. Judge Foley also observed that the contents of the petition

and the briefs and records on Foye's direct appeal furnished no support for any claim that exculpatory material had been improperly withheld from the defense in violation of a federal constitutional right. But it is clear from Judge Foley's decision that he was not furnished a complete copy of Investigator Brown's report to examine.

We reason, therefore, that absent disclosure of the complete report to the district court, it is impossible to conclude with certainty that petitioner has not raised a constitutional issue cognizable in a federal habeas corpus proceeding. Judge Foley, in effect, recognized this problem in the following statement in his memorandum:

"There is no showing, and I recognize that an examination only would fully inform, that non-disclosure was prejudicial to such extent so as to deprive the petitioner of a fair trial. It is only in such a situation that federal habeas corpus will lie. Scalf v. Bennett, 408 F. 2d 325, 330 (8th Cir. 1969)."

Since the report has not been examined by the district court, we remand for a hearing before him so that he will be able to examine the report in its entirety. Only in this way can it be determined whether the prosecution has failed to disclose evidence vital to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). As Judge Foley recognized, federal habeas corpus will lie to remedy a prejudicial non-disclosure. United States ex rel. Meers v. Wilkins, 326 F. 2d 135 (2d Cir. 1964); Clay v. Black, 479 F. 2d 319 (6th Cir. 1973); Scalf v. Bennett, 408 F. 2d 325, 330 (8th Cir.), cert. denied, 396 U.S. 887 (1969); Levin v. Katzenbach, 363 F. 2d 287, 291 (D.C. Cir. 1966).

Accordingly, we set aside so much of the aforesaid order of the district court dated January 4, 1974 which pertains to the investigative report issue, and remand this case for further proceedings consistent with this memorandum.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. GEORGE FOYE,

Relator-Petitioner,

-against-

73-CV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: HON. J. EDWIN LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY, DANEMORA, NEW YORK,

GREETING:

You are hereby Commanded to have the body of GEORGE FOYE now
detained in Clinton Correctional Facility, Dannemora, New York,
under your custody as it is said, under safe and secure conduct
before our District Court within and for the Northern District of
New York, at the United States Federal Post Office Building, Broad-
way, Albany, New York, on the 4th day of September, 1974, at 1:30
o'clock in the afternoon, there to appear for a hearing to be held
pursuant to an Order of the County of Appeals, Second Circuit, dated
June 10, 1974, and immediately after the termination of such hearing
that you return him to the said Clinton Correctional Facility,

Dannemora, New York, under safe and secure conduct, and have you then and there this writ.

WITNESS the Honorable James T. Foley, United States District Judge for the Northern District of New York, at the United States Court House, Albany, New York, this 15th day of August, 1974.

s/ James K. Evans

Chief Dep. Clerk of the District Court
of the United States for the
Northern District of New York

The foregoing writ is hereby
allowed.

Albany, New York, August 14th, 1974.

s/ James T. Foley

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. GEORGE FOYE,

Relator-Petitioner,

against -

73-DV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION AND ORDER

By memorandum-decision and order dated January 4, 1974, I denied and dismissed the petition of the petitioner for a writ of habeas corpus. The petition was substantial, raised several grounds to support request for federal habeas corpus relief, and was lawyer prepared.

The Court of Appeals, Second Circuit, by decision dated June 10, 1974, set aside so much of my January 4, 1974 decision which pertained to the investigative report issue and remanded for further proceedings in the District Court solely on that issue. The remand order and file were received by the Clerk's Office of this Court at Utica, New York on August 1, 1974 from the Circuit Court. The file was received by me from our Clerk's office August 12, 1974.

The remand is for a very limited purpose as stated in the opinion of Judge Tyler. ____ F. 2d ____, ____, Slip Op. No. 74-1231, at 4026-4028. (2d Cir. June 10, 1974). It is for me to hold a hearing so I can examine in its entirety the complete investigative report of New York State Police Investigator Brown, made in the investigation of the case which led to the conviction of the petitioner of a Class A Felony of Murder.

The hearing so directed is set for Wednesday, September 4, 1974, at 1:30 P. M., to be held in the Main Court Room, Federal Post Office Building, Albany, New York. The attorney for the petitioner requests that petitioner be produced in Court for the hearing, and a writ of habeas corpus shall issue for his production and the time and place noted. It is requested that the District Attorney of Sullivan County or Assistant Attorney General Joseph R. Castellani submit to me, in my Chambers at Albany, New York, on or before August 30, 1974, the investigative report in issue. I also request that consideration be given to furnishing the petitioner's attorney with a copy of the investigative report before the hearing unless there is good reason presented for withholding the report from such inspection.

It is so Ordered.

Dated: August 14, 1974

Albany, New York

s/ James T. Foley
UNITED STATES DISTRICT JUDGE

NEW YORK STATE POLICE

MEMORANDUM

File #138-3

SP Manhattan NN-22 L.I.

Troop Station
January 23, 1972

Date _____

Captain K. D. Odell

To:

Investigator J. D. MacKay *JDM*

From:

JAMES FOYE /aka GEORGE THOMAS/ (SP FERNDAL NN-88,
MANSLAUGHTER 1st Compl.)

Subject

- R U C -

1. On 1/12/72 SP Ferndale, New York dispatched file 12, teletype message, #381, advising that GEORGE FOYE, n-m-dob 5/9/41 5 feet, 5 inches tall, 125 pounds, was wanted on a charge of manslaughter first degree. No address was given.

2. On 1/13/72 Investigator C. BROWN, SP Ferndale, New York telephonically advised that the wanted subject was possibly staying with a sister, BESSIE ROUSE, at apartment 3B, 2254 7th Avenue, New York, New York.

3. On this same date the assigned and Investigator P. WALDRON checked the given address with negative results.

4. In that FOYE was believed to be operating a 1963 or 1964 Oldsmobile sedan, white, bearing Pennsylvania registration 94297Y, a check was made of the immediate area of the sister's residence and the vehicle located on 133th Street just east of 7th Avenue. A surveillance was maintained on the vehicle for approximately one half hour at which time a subject entered the double parked vehicle.

JDM;JJK
1/23/72
Distribution:
3 - Troop "F"
1 - File

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED

SEP 4 1974

AT O'CLOCK M.
L. R. SCULLY, Clerk
ALBANY

Court Exhibit

5. The occupant of the vehicle fitted the description of FOYE and at 2:40 P.M. on 1/13/72 was arrested on the manslaughter 1st charge. A search of his person disclosed a registration for the vehicle he was occupying, the registration being in the name of GEORGE THOMAS, Pocono Downs, Scranton Highway, Wilkes Barre, Pennsylvania.

6. FOYE stated that his true name was GEORGE THOMAS FOYE. He was advised at this time, in the presence of Investigator WALDRON, that he need not make any statements, that anything he said could be used against him in a criminal action and that he was entitled to the aid of an attorney. He requested that he be permitted to call an attorney and was permitted to do so upon arrival at SP Manhattan.

7. Upon arrival at SP Manhattan defendant was immediately transported to SP Tarrytown, New York to be turned over to SP Ferndale, N.Y. personnel for arraignment.

8. RUC to the managing troop.

9. The following teletype messages are associated with this investigation:

381, file 12, SP Ferndale, N.Y., Jan. 12, 1972.
236, file 20, SP Manhattan, N.Y., Jan. 14, 1972.

TROOP F STATION Ferndale DATE January 14 19 72

1. DEFENDANT(S): INCLUDE NAME, ADDRESS, DOB AND ALIAS.

GEORGE THOMAS FOYE, 17 Pelton Street, Monticello, N.Y., DOB 5/9/41

Alias- GEORGE THOMAS

DELOIS HARDEN, 17 Pelton St., Monticello, N.Y. DOB 6/23/50

2. CHARGE: INCLUDE NAME OF CRIME; SECTION OF LAW; TIME, DATE AND PLACE OF CRIME.

Manslaughter 1st Degree, 125.20, sub 1 of Penal Law

Between April 1970 and October 24, 1971, Village Monticello, NY

3. ARREST: INCLUDE TIME, DATE AND PLACE; WHETHER DEFENDANT WAS ARRESTED WITH OR WITHOUT A WARRANT.

HARDEN- 1/12/72, 4:30 PM, Village Monticello, N.Y. With Warrant

FOYE- 1/13/72, 2:40 PM, New York City, N.Y. Active File 12 Teletype

4. ARRAIGNMENT: NAME AND TITLE OF MAGISTRATE; TIME, DATE AND PLACE OF ARRAIGNMENT.

HARDEN- BURTON LEDINA, Village Justice, V/Monticello, N.Y. 7:00PM, 1/12/72

FOYE " " " " " " 7:00PM 1/13/72

5. ADJOURNMENT: INCLUDE REASON FOR ADJOURNMENT, ADJOURNED DATE, TIME AND PLACE.

Examination of witnesses set for 1/18/72, 7:00PM, Village/ Monticello, NY

6. EXAMINATION: IF WAIVED, INDICATE; IF REQUESTED INCLUDE THE TIME, DATE AND PLACE.

7:00PM 1/18/72, Village Hall, Village, Monticello, N.Y.

7. DEFENSE ATTORNEY: IF KNOWN, INCLUDE NAME AND ADDRESS.

HARDEN- IRA COHEN, Monticello, N.Y.

FOYE- MICHAEL DAVIDOFF, Monticello, N.Y.

MICHAEL HARDEN, age 4, 17 Pelton Street, Monticello, N.Y.

9. SYNOPSIS OF FACTS:

**Defendants did beat child over extended period of time causing death
of MICHAEL HARDEN, age 4**

10. EVIDENCE: INCLUDE A LIST OF ALL EVIDENCE, ITS LOCATION AND CUSTODIAN.

11. WITNESSES: INCLUDE NAME, ADDRESS AND AGE OR APPROXIMATE AGE.

CLARENCE WILLIAMS, PATRICIA MANNION, 17 Pelton St., Monticello, N.Y.

ANNIE LEE PARHAM, East 161st St., Bronx, N.Y.

MAGDALINA TIRADO, 315 West 94th St., NYC, NY

ELIZABETH ROBERTS, Route 52, Liberty, N.Y.

**12. ATTACHMENTS TO THIS REPORT: LIST ALL ATTACHMENTS, VIZ: COPY OF INFORMATION, DEPOSITION, STATEMENTS ETC.
statements of above witnesses**

13. REMARKS:

C.D.BROWN

Investigator

NAME OF MEMBER

TITLE

SAV. C. D. BROWN

REPORT

1-10-72
HOMICIDE/MANSLAUGHTER 1st. DEGREE
Formdale III-88

SYNOPSIS:

On 1/7/72, Doctor SIMON P. SCHIFF, Sullivan County Coroner, Liberty, New York, advised that MICHAEL HADEN, age 4, DOB 5/15/67, 17 Polton Street, Monticello, New York, had expired at the Monticello Community General Hospital, Monticello, New York. Re: Formdale Case III-1942, Endangering Welfare of a Child/II/, dated 12/14/71. Upon a completion of an autopsy, it was the coroner's verdict that the deceased died as a result of pneumonia caused by a vegetable state, which was subsequently caused by repeated blunt head injuries over an extended period of time. Subsequent investigation in the subject case resulted in obtaining statements from several witnesses and the arrest of GEORGE THOMAS FOYE, DOB 5/9/41, and DELOIS HADEN, DOB 6/23/50, 17 Polton Street, Monticello, New York, for violation of Section 125.20, sub-division 1 of the Penal Law, Manslaughter 1st. Degree. Case closed by arrest.

DETAILS:

AT FORMDALE, NEW YORK

1. On 1/7/72, Doctor SIMON P. SCHIFF, Sullivan County Coroner, Liberty, New York, advised MICHAEL HADEN, age 4, 17 Polton Street, Monticello, New York, had expired at the Monticello Community General Hospital, Monticello, New York. Re: Formdale Case III-1942, Endangering Welfare of a Child/II/, dated 12/14/71. At this time, Doctor SCHIFF advised that it was his opinion that the deceased had died of homicidal causes.

AT MONTICELLO, NEW YORK

On 1/7/72, an autopsy was performed at the Van Inwegen-Gray Funeral Home, in Monticello, New York. Subject autopsy was performed by Doctor ADALBERT GUTMAN, Monticello, New York. In attendance at subject autopsy were Investigator W. Holik, ID Section, SP Middletown, New York, and Investigator R. R. Fuento, FBI, Formdale, New York. At that time, Doctor GUTMAN opened the cranial cap, conducted an examination of the same, and removed the brain. He thereupon opened the chest cavity and removed the vital organs, which were turned over to Doctor SIMON P. SCHIFF, Sullivan County Coroner, Liberty, New York. Doctor SCHIFF subsequently examined same and sent samples to Doctor HAROLD MANELOR, Middletown, New York, for microscopic examination.

3.

On 1/10/72, interviewed DEY PERAY, self-employed

musician, Monticello, New York. PERRY related that he had been advised of the possible misuse of MICHAEL HARDEN, who was unable to give any further information which would aid in the investigation.

4. On 1/10/72, interviewed ELLERY REYNOLDS, owner and operator of Ellery's Dry Cleaning, Route 42, Monticello, New York. At this time, REYNOLDS related that he had spoken with JERRY CORREL, a high school student at the Monticello High School, on 1/7/72, at which time, she had related to him that she had heard beatings of the child over a period of time when she had lived in the apartment building. At this time, REYNOLDS was unable to furnish any additional information to further aid in the investigation.

5. On 1/10/72, interviewed JERRY CORREL, age 10, 338 Broadway, Monticello, New York, at the Monticello High School. At this time, JERRY related she had been at the FOYE-HARDEN apartment approximately two weeks prior to the child being taken to the hospital on 10/24/71, at which time, she noticed the child had swollen eyes and a swollen forehead. At this time, CORREL related that she had not been in the apartment and witnessed any beatings of the child as they had moved from the apartment building approximately one year prior to this interview.

6. On 1/10/72, interviewed ABEL TURNER, Office Manager of Community Action to Help the Economy, Monticello, New York. TURNER related that her office had received calls relative to misuse and abuse of MICHAEL HARDEN for approximately two years. She further related that the persons calling the office refused to identify themselves and only told of incidences where they had heard the child beaten. She further related that she had also received calls of persons who refused to identify themselves, which stated that GEORGE FOYE had placed food in the garbage and that on the following morning, she had received another call stating that GEORGE FOYE had removed the food from the garbage and forced MICHAEL HARDEN to eat it.

7. On 1/10/72, interviewed LESTER HOLMES, Pleasant View Avenue, Monticello, New York. This subject is a neighbor of DELOIS HARDEN and admitted being at the HARDEN-FOYE apartment on numerous occasions but refused to discuss any aspects of the case.

Forndale
MI-68

9. On 1/10/72, reinterviewed DEY PERRY, Monticello, New York. PERRY related that his son-in-law, WILLIAM HARDEN, who presently resided in the Boston, Massachusetts area, was a brother of DELOIS HARDEN and had been in the Monticello area and was believed to have left this date, 1/10/72. He related that WILLIAM had spoken to his sister, DELOIS, but was unaware of any information he may have obtained. At this time, PERRY was requested to contact his son-in-law and have him contact this investigator at the Forndale Station as soon as possible.

AT FERNDALE, NEW YORK

On 1/10/72, interviewed Mrs. EVA ROBERTS, Child Welfare Department, Sullivan County Social Services Department, Infirmary Road, Liberty, New York. At this time, it was requested that the history of the child during the period of time he had been placed in a foster home be furnished from the Social Services Department to be turned over to Doctor SIDNEY P. SCHIFF, Sullivan County Coroner, Liberty, New York, to aid in the coroner's inquest into this case. At this time, she advised that the child had been under the care of the Social Services Department from the age of three months until approximately two and a half years of age. During this period of time, the child had been in a foster home in the Summitville, New York area and had been treated by Doctor FREIDBERG, of Ellenville, New York, who had cared for the child from August 1967 and had last seen the child on May 1970. At this time, she related that she would obtain the medical records and furnish same to Doctor SCHIFF. She further related that on one occasion, she had gone to the HARDEN-FOYE residence, 17 Pelton Street, Monticello, New York, in an attempt to check on the condition of the child but had been refused admittance to the apartment occupied by HARDEN and FOYE and had left the residence in fear of personal physical danger. She related that during the period of time the child had been under the care of the Social Services Department, the child had appeared to be a healthy, normal child. She was unable to give any further information at this time.

10. On 1/10/72, telephonically interviewed WILLIAM HARDEN, 102 C Westminster Avenue, Boston, Massachusetts, at phone number 617-442-6214. This subject is a brother of DELOIS HARDEN and

had been in the Monticello area upon hearing of the death of MICHAEL HARDEN. He related that his sister, DELOIS HARDEN, had refused to discuss the injuries to MICHAEL HARDEN with him, and he was unable to give any information which would further aid in the investigation.

11. On 1/10/72, interviewed LOUIS YANK, Chief of Police, Monticello Police Department, Monticello, New York. Chief YANK had originally contacted this department in regards to the Child Abuse Case on 10/24/71 but related that his department had thus far been unable to come up with any additional information which would aid in this investigation.

12. On 1/10/72, attempted to interview LORRAINE HARDEN, 53 Liberty Street, Monticello, New York. This subject is the mother of DELOIS HARDEN and grandmother of the deceased child. At this time, LORRAINE HARDEN requested that this investigator return on the following day due to her present mental state as the child's funeral had been on this date. Arrangements were made for interview on 1/11/72.

AT MONTICELLO, NEW YORK

13. On 1/11/72, interviewed LORRAINE HARDEN, 53 Liberty Street, Monticello, New York. At this time, LORRAINE HARDEN stated that on Saturday, 1/8/72, GEORGE FOYE had been at her apartment and stated that he was responsible for MICHAEL's death. He said "Mom, I killed MICHAEL myself. He didn't speak another word after I hit him." Then she related that GEORGE FOYE sat in a chair and started crying. At this time, LORRAINE HARDEN was requested to reduce the statements she had just made in the form of a Supporting Deposition to which she agreed. She was immediately transported to the Monticello Police Department, Monticello, New York, where a deposition was obtained in regards to the statement she had made to this investigator.

14. On 1/11/72, reinterviewed ADELL TURNER, Office Manager, Community Action to Help the Economy, Broadway, Monticello, New York. At this time, this subject was questioned in regards to the two unidentified females who had been at the FOYE-HARDEN apartment on 10/24/71 at the time the child had been rendered unconscious. She

stated that she believed one of the subjects to be LEE MANN, a colored female, who was presently residing someplace in the New York City area to the best of her knowledge. She could give no definite address or possible location. She related she was not familiar with any subject by the name of MARGE MANSO, refer Paragraph 19, Forensic Case 101-1942, dated 12/14/71. She could offer no additional information at this time.

15. On 1/11/72, interviewed CLARENCE WILLIAMS, Coffee Shop Manager at the Danmore Hotel, Sachet Lake, New York. This subject occupies Apartment 3 at 17 Bolton Street, Monticello, New York. This apartment being on the same floor as Apartment 1 occupied by MANN and FOYE. WILLIAMS related that he had been at the MANN-FOYE apartment during Christmas time 1970 having a drink with FOYE and MANN when FOYE had called the child to the center of the floor of the living room of the apartment, and, with the use of foul language, had instructed the child to demonstrate an act of sexual intercourse. When the child failed to give a proper demonstration, FOYE struck the child beside the head knocking him to the floor. He then ordered the child to get back on his feet and again demonstrate the act of sexual intercourse. WILLIAMS related that the child was struck approximately three times by FOYE due to the fact that he did not give a proper demonstration as instructed. Upon further interview of CLARENCE WILLIAMS, he related that when the child had been returned to the MANN-FOYE apartment from a foster home, he had been a resident of Apartment 3 at 17 Bolton Street at that time. He related the child appeared to be in good health, spoke well for a child of that age group, and appeared to be adjusted, happy child. He related another incident when the child had been in his apartment in the presence of his mother, DELOIS MANN, and had seen a cookie jar sitting on the table. At this time, the child pointed to the cookie jar and asked for a cookie and water. The mother refused to let the child have the cookie or the water and returned him to her apartment. WILLIAMS further related another incident when he had been at the FOYE-MANN apartment, the date he could not remember, when he had observed DELOIS MANN take food from the garbage can, place it before the child, and force him to eat same. He further related that the longer the child stayed at the home, he appeared to get worse, and he had never seen him outside of the house to be allowed to play with other children. At

this time, WILLIAMS could give no further information to aid in the investigation.

16. On 1/11/72, interviewed PAT MATHISON, 17 Polton Street, Monticello, New York. This subject, who resides in Apartment 3 with CLARENCE WILLIAMS, and she related that on many occasions she had heard what appeared to be MICHAEL MATHISON being beaten in the apartment with what sounded like a belt. She further related one instance which occurred in the month of April 1971, at which time, she was in her apartment and heard GERALD FORD in the bathroom with MICHAEL. She related that during this incident, the child was being beaten for saying a foul word and when asked if he would repeat the word, he replied no in a very pitiful sound. He was then asked what he was not going to repeat, and when the child did not answer, he was beaten until he voiced the word involved, and then was beaten for saying it. She related this incident lasted in excess of 20 minutes. She further related that on numerous occasions, she heard what appeared to be the child being beaten in the bathroom, which has a window adjacent to the hallway near her apartment door, and heard thumps, which sounded as if the child was possibly being shoved or thrown against the wall. On the same date, 1/11/72, a statement was obtained from PATRICIA MATHISON, which is attached hereto and made a part hereof this report, marked Obscene.

17. On 1/11/72, interviewed JOE KELLY, 17 Polton Street, Monticello, New York. This subject related that she works at different employment during the daylight hours and usually spends the evenings at Hutchins Restaurant, the employment of her common-law husband. She was unable to give any useful information, which would further aid in the investigation.

18. On 1/11/72, interviewed ANN CORREL, 330 Broadway, Monticello, New York. CORREL related that she had lived in the apartment house at 17 Polton Street up until approximately one year ago, at which time, she had moved to 330 Broadway. She related that she had last seen the child a couple of weeks before being admitted to the hospital, at which time, the forehead and eye area were swollen and the lips were all sore like the child had been slapped numerous times in the mouth. She was unable to give any further information.

Ferndale
NY-89

which would aid in the investigation.

19. On 1/11/72, reinterviewed EVA ROBERTS, Sullivan County Social Services Department, Child Welfare Section, Liberty, New York. At this time, Mrs. ROBERTS was requested to furnish any records from the Montefiore Medical Center, Bronx, New York, in relation to MICHAEL GARDEN, which she obtained upon returning the child from Montefiore Hospital to Monticello Community General Hospital. She related that all of the records in her possession would immediately be turned over to Doctor SIDNEY P. SCHIFF, Sullivan County Coroner, Liberty, New York, to aid in the coroner's inquest.

AT FERNDALE, NEW YORK

20. On 1/12/72, interviewed ELIZABETH ROBERTS, Little Britain Trailer Park, Liberty, New York. This subject employed at the Concord Hotel, Kiamosha Lake, New York. ROBERTS related that she had resided at 17 Felton Street, Monticello, New York, in Apartment 2 from the period of April 1970 through October 1971. She continued that she knew the two people who lived in Apartment 1 as BIRD and LOIS. She related that there were three children in the apartment with them, and she quoted the children's names as being MICHAEL, TITIA, and CHRISTOPHER. She related that this subject she referred to as BIRD she had also heard referred to as GEORGE FOVE. She stated that on many occasions, she had heard beating MICHAEL, the oldest of the children. She further related that he always referred to the child as BOY or used another foul word. It sounded to her as though the boy was being beaten with a belt. She stated that these incidents usually occurred in the bathroom of the apartment occupied by FOVE and GARDEN. She continued that after what sounded like the boy being beaten with a belt and hollering and foul language being used by FOVE, she heard a thump against the wall that sounded as if the boy had been thrown or shoved against the wall and then with foul language, FOVE had instructed the child to sit on the toilet. She continued that the beatings had occurred normally a couple of times a week during the period of time she lived at the apartment. At this time, a statement was obtained from ELIZABETH ROBERTS, which is attached hereto and made a part hereof this report, marked Obscure.

21. On 1/12/72, reinterviewed EVA ROBERTS, Sullivan County Social Services Department, Liberty, New York, relative to the location of the foster parents of the home the child had been placed in at the age of approximately three months. At this time, she related that the child had been in the residence of ALBERTA BOVA, Phillipsport, New York. She checked residence and advised this investigator that the BOVA subject was not at home and would possibly be available for interview on 1/13/72.

22. On 1/12/72, a conference was held with Sullivan County District Attorney LOUIS D. SCHENBERN, Monticello, New York, and Sullivan County Coroner SIDNEY P. SCHIFF, Liberty, New York, and CI Unit Coordinators, at which time, all evidence pertaining to subject case thus far was reviewed. At this time, it was the opinion of the Sullivan County District Attorney that enough evidence was available to pursue a case of Manslaughter 1st. Degree in violation of Section 125.20, Sub-division 1 of the Penal Law of the State of New York, against both subjects.

23. On 1/12/72, an accusatory instrument, felony complaint, was filed before WILLIAM D. SCHOP, Acting Village Justice, Village of Monticello, Monticello, New York. At this time, Justice SCHOP issued warrants of arrest for GEORGE THOMAS FORD and DELOIS HARMEN, 17 Falton Street, Monticello, New York, charging Manslaughter 1st. Degree, violation of Section 125.20, Sub-division 1 of the Penal Law of the State of New York.

AT MONTICELLO, NEW YORK

24. On 1/12/72, arrested DELOIS HARMEN, DOB 6/23/50, 17 Falton Street, Monticello, New York, at the apartment of GLORIA JONES, same address, Monticello, New York, on the warrant of arrest charging Manslaughter 1st. Degree. At this time, the defendant was immediately advised of her rights as follows:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.

She was immediately asked if she understood her rights which had just been given her to which she replied "yes" and stated that she had an attorney, IRA COHEN, the Public Defender, which had been assigned her case on the previous arrest, refer Forndale IM-1942. Upon being advised that she would be required to be transported to the Forndale State Police Barracks for processing, fingerprints, and photographs, the defendant related she would contact her attorney from the Forndale Station due to the fact she had no phone at her residence. While at the Forndale Station, the defendant telephonically communicated with her attorney, IRA COHEN. When asked if she cared to discuss the case involving her son, MICHAEL HARDEN, the defendant related that she did not care to discuss subject case at that time. No further interview was conducted. The defendant was fingerprinted and photographed at the Forndale Station and assigned Troop F I. D. (F-0457). Upon completion of the processing, the defendant was immediately transported to Monticello for arraignment.

25. On 1/12/72, DELOIS HARDEN, DOB 6/23/50, 17 Bolton Street, Monticello, New York, was arraigned before Village Justice ARTHUR LEDER, Village of Monticello, Monticello, New York, on a charge of Manslaughter 1st. Degree in violation of Section 125.20, Subdivision 1 of the Penal Law of the State of New York. The defendant was immediately committed to the Sullivan County Jail, Monticello, New York, without bail pending a NYSIIS report.

26. On 1/12/72 with members of the Monticello Police Department and members of the Forndale DCI, a thorough check was made of the Monticello, New York area in an attempt to apprehend GEORGE THOMAS FOYE. These efforts met with negative results.

27. On 1/12/72, obtained information on a vehicle

Ferndale
MX-88

being operated by GEORGE THOMAS FOYE through a traffic summons which had been issued to Mr. HOLMES, Pleasant View Avenue, Monticello, New York, on a previous date when subject, HOLMES, was operating FOYE's vehicle. Also obtained information through the Monticello Police Department that the wanted subject, GEORGE THOMAS FOYE, was possibly employed at Yonkers Raceway and adjacent tracks in the Yonkers area as a groom.

AT FERNDALE, NEW YORK

28. On 1/12/72, a File 12 Teletype message was dispatched to AFD requesting the arrest of GEORGE THOMAS FOYE, AKA GEORGE THOMAS, operating a 1963 Oldsmobile sedan, color white, bearing Pennsylvania registration 94297-Y.

29. On 1/12/72, SP Hawthorne, New York, was contacted telephonically requesting a check be made of the racetracks in the Yonkers, New York area in an attempt to locate and effect the warrant of arrest for GEORGE THOMAS FOYE.

30. On 1/12/72, interviewed MICHAEL DAVIDOFF, Attorney, Monticello, New York, assigned attorney for GEORGE THOMAS FOYE. At this time, MICHAEL DAVIDOFF related that his client had been employed at the Yonkers Raceway, Yonkers, New York, and had a sister living in the New York City area. At this time, DAVIDOFF was unable to give any additional information which would aid in the location of the wanted subject.

31. On 1/13/72, Attorney DAVIDOFF furnished the following name and address of a sister of the wanted subject in the New York City area:

1. BESSIE ROUSE, 2254 Seventh Avenue, New York City, New York, Apartment 3D

32. On 1/13/72, telephonically contacted SP Manhattan, Investigator J. D. Mackay, requesting a check of the address listed at 2254 Seventh Avenue, New York City, New York. During subject check, the plate number and the vehicle description as listed to the wanted

Forndale
NY-88

subject was located on 133rd. Street just east of Seventh Avenue. Surveillance was maintained on the vehicle for approximately 1/2 hour, at which time, a subject entered the double parked vehicle. The occupant of the vehicle fitted the description of that as given of GEORGE FORD and at 2:40 p.m. on 1/13/72, GEORGE THOMAS FORD was arrested for a charge of Manslaughter 1st. Degree. At this time, a search of his person disclosed a registration for a vehicle he was occupying, registration being in the name of GEORGE THOMAS, Second Down, Scranton Highway, Wilkes-Barre, Pennsylvania. FORD stated that his true name was GEORGE THOMAS FORD and at that time in the presence of Investigator Waldron, he was advised that he need not make any statements, that anything he said could and would be used against him in a criminal action, that he was entitled to the aid of an attorney. He requested that he be permitted to call an attorney and was permitted to do so upon arrival of SP Manhattan. The defendant was immediately transported from SP Manhattan to SP Tarrytown and turned over to this investigator. The results of the investigation conducted by and the arrest made by Investigator J. D. Mackay were made the subject of a General 7, Memorandum, which is attached hereto and made a part hereof this report.

33. On 1/13/72, GEORGE THOMAS FORD, DOB 5/9/41, 17 Felton Street, Monticello, New York, was immediately transported to the Forndale Station, Forndale, New York, and fingerprinted and photographed and assigned Troop F I. D. 43-8450. The defendant related that he had spoken with his attorney, and he did not care to discuss the case. Subject was not questioned regarding subject case.

34. On 1/13/72, the defendant, GEORGE THOMAS FORD, DOB 5/9/41, 17 Felton Street, Monticello, New York, was arraigned before Village Justice DUREN LEDINA, Monticello, New York, on the charge of Manslaughter 1st. Degree in violation of Section 125.20, Sub-division 1 of the Penal Law. At the arraignment, the defendant was represented by his attorney, MICHAEL DAVIDOFF, Monticello, New York. At this time, Justice LEDINA committed the defendant to the Sullivan County Jail, Monticello, New York, without bail pending a NYSLIS report regarding same.

35. On 1/18/72, an examination of witnesses was

conducted at the Monticello Village Court with DELOIS HARTEN being represented by IRA CONN, Public Defender, Monticello, New York, and GEORGE FORT by MICHAEL DAVIDOFF, Assigned Attorney, Monticello, New York. The people being represented by CARL SELVERSTEIN, Assistant District Attorney, Sullivan County District Attorney's Office, Monticello, New York. Upon the completion of motions being made, MICHAEL DAVIDOFF, Attorney for GEORGE FORT, waived examination of witnesses for his client. The examination of witnesses in regards to DELOIS HARTEN was conducted on 1/10/72 with the exception of the testimony of Doctor SAMUEL P. SCHIEFF, Sullivan County Coroner, which was scheduled to be held on 1/20/72. Upon the conclusion of the examination, it was the decision of Judge LEDNER that the defendant be held for action of the Sullivan County Grand Jury.

36. On 2/3/72, the case of People vs. HARTEN and FORT was presented to the Sullivan County Grand Jury, Monticello, New York. At the conclusion of the Grand Jury testimony, both subjects were indicted on the charge of Manslaughter 1st. Degree in violation of Section 125.20, Sub-division 1 of the Penal Law of the State of New York.

37. On numerous occasions since the inception of this case and Fordale Case NY-1942, checks have been made in an attempt to locate ALICE LEE PARKIN and MARGE MANCO, the two female subjects believed to have been at the apartment at 17 Polton Street on 10/24/71 at the time that the child, MICHAEL HARTEN, became unconscious.

38. On 2/6/72, information was received from ID Palisades Parkway, New York, that a subject by the name of JOSEPH P. SCAVELLA, DOB 3/10/40, New York City area, was in custody by that department for Possession of Stolen Property. Due to prior arrests in the Sullivan County area, it was believed that ALICE LEE PARKIN resided with JOSEPH SCAVELLA sometime in the New York City area.

AT BEAR MOUNTAIN, NEW YORK

39. On 2/9/72, interviewed Detective Lieutenant C. E. BARBERA, Palisades Park Police, Bear Mountain, New York. Lieutenant BARBERA related that members of his department had arrested JOSEPH

SCAVELLA and a subject by the name of IRVING SIN on the Palisades Parkway in possession of a stolen motor vehicle. No further related both subjects were presently incarcerated in the Rockland County Jail, New City, New York.

AT NEW CITY, NEW YORK

40. On 2/9/72, permission was obtained from Attorney PARENZ, Public Defender, Rockland County Public Defender's Office, New City, New York, to interview JOSEPH SCAVELLA at the Rockland County Jail.

41. On 2/9/72, interviewed JOSEPH SCAVELLA, Concourse Plaza Hotel, East 161st. Street, Bronx, New York, Room 522, at the Rockland County Jail, New City, New York. At this time, SCAVELLA stated that he did in fact reside with ANNIE LEE PARENZ at the aforementioned address and that she was presently at the hotel in Bronx, New York. At this time, SCAVELLA stated that his common-law wife had, in fact, been at the FOYE-HARDEN apartment on the day that MICHAEL HARDEN had become unconscious and that he would contact her telephonically and make arrangements for this investigator to interview her relative to any occurrence she witnessed on 10/24/71. He was immediately availed the use of a telephone by jail personnel and contacted ANNIE LEE PARENZ at the above stated address and advised her of the desire of this investigator to interview her relative to the aforementioned incident.

AT BRONX, NEW YORK

42. On 2/10/72 at the Concourse Plaza Hotel, East 161st. Street, Bronx, New York, contact was made with ANNIE LEE PARENZ, at which time, she was requested to proceed to SP Manhattan, New York, for the purposes of discussing this case and obtaining a written statement in regards to same, to which the subject agreed.

AT SP MANHATTAN, NEW YORK

43. On 2/10/72, ANNIE LEE PARENZ, age 28, DOB 10/16/43, Concourse Plaza Hotel, East 161st. Street, Bronx, New York, was

interviewed at 67 Manhattan and a statement obtained in regards to what she had observed while at the apartment occupied by FOUZ and HARMEN. She related that she had arrived at the FOUZ-HARMEN apartment on 10/23/71 at approximately 8:30 in the evening. She stated that the boy, MICHAEL, was sitting on the floor beside the radiator in the corner facing the closet with his back to the television set. She related at this time that it appeared that his eyes were black and his forehead was swollen. She replied that her inquiry as to the condition of MICHAEL had received a reply that he merely had a cold in his eyes. She further related that she left for the evening and returned to the apartment at approximately 8:30 or 9:00 a.m. on Sunday morning, 10/24/71. At this time, she related that MICHAEL was still sitting in the same position as he had been the night before when she left the apartment. She continued that she and her friend, who she had identified as MARION TERANO, 315 West 94th. Street, Room 724, Mount Royal Hotel, New York City, New York, had decided to spend the day at the FOUZ-HARMEN apartment. She related that she was sitting in the front room where MICHAEL was sitting in the corner and noticed him try to stand up on several occasions, at which time, he appeared to be too dizzy to get to his feet. She said each time he attempted to stand, he would grab his head and sit back on the floor. An inquiry was made of DELOIS HARMEN as to the condition of the boy, she replied that he was merely sleepy. She related a short time later that the lad crawled across the floor and attempted to climb onto the bed upon which GEORGE FOUZ was lying. At this time, FOUZ used some abusive language and informed the child not to move. She stated that during the period of time she was at the apartment, she had been in the living room and had not seen the child fall against the radiator or any other object. She continued to relate that on a previous instance she had been at the apartment when MICHAEL HARMEN had wet upon himself, and LOIS had started to holler at him for doing same. By that time, GEORGE FOUZ had grabbed MICHAEL and smashed him through the kitchen into the bathroom, closed the door behind him. She related she could not see what went on in the bathroom but heard things falling like MICHAEL was being thrown or shoved against things in the bathroom. She continued that she could hear FOUZ cursing and using very abusive language to the child after which time, he brought him from the bathroom, and while standing by the kitchen table, he picked MICHAEL up by the neck from the front and with the force he threw

MICHAEL, he went into the front room landing on his bed and striking the back of his head on the window sill. He further related that this incident occurred sometime around Thanksgiving in the year 1970. She continued that on numerous occasions, upon dates which she could not recall, she had seen ROY strike the boy beside the head with his hand with the force that would normally be used to strike a grown person. RABBIT was then asked if she had been at the apartment at times and observed ELOISE HARTMAN mistreating or abusing the child. She repeated that during the month of June 1971, she had been at the apartment when the child had again wet upon himself. When the child failed to answer her, she placed the child in the bathroom, stood him over the commode, holding his penis in his hand. She related that she had stayed at the apartment for over two hours. When she left, the child was still being made to stand in the same position committing the same act. The statement obtained from RABBIT is attached hereto and made a part hereof of this report, marked Obsolete.

44. On 2/10/72, Investigator E. T. Mc Hanna and Investigator T. Cronin, SP Manhattan, New York, proceeded to 315 West 94th. Street, New York City, New York, and interviewed ELOISE HARTMAN, Apartment 724, relative to subject case. At this time, HARTMAN related to Investigator Mc Hanna that she had in fact been at the apartment on the date the child became unconscious and had gone to the hospital with the child. At this time, she was requested to accompany Investigators Mc Hanna and Cronin to SP Manhattan for the purpose of obtaining a statement. She related that she had been at the ROY-HARTMAN apartment on Sunday, 10/24/71, when she had observed MICHAEL crawl across the floor and attempt to crawl up onto a bed upon which GEORGE ROY was lying. When the boy attempted to crawl upon the bed, she stated ROY gave him a hard shove back onto the floor and used abusive language and advised him to return to his place by the radiator. She continued that when she asked ROY to take the baby to the hospital or to a doctor, he advised her that the child was just acting up and used abusive language to the child and told him to quit acting up and then replied that he was not going to take him to a doctor. She further related that she had placed a spoon in the boy's mouth as she thought he was possibly swallowing his tongue, and it was approximately 30 minutes later when ROY was convinced to take the child to the hospital. The subject of the interview conducted

Fordale
ME-80

with MAGALINA TIRADO was made the form of a written statement, which is attached hereto and made a part hereof, marked Obscene.

AT FORDALE, NEW YORK

45. This case is closed by the arrest of GEORGE GEORGE FORD, DOB 5/9/41, and DELOIS HARDEN, DOB 6/23/50, both of 17 Bolton Street, Monticello, New York.

46. The following Teletype messages were dispatched in association with this investigation:

- 224, File 3, SP Fordale, New York, 1/7/72
- 301, File 12, SP Fordale, New York, 1/12/72
- 302, File 13, SP Fordale, New York, 1/12/72
- 303, File 3, SP Fordale, New York, 1/12/72, added information
- 305, File 12, SP Fordale, New York, 1/12/72, added information
- 390, File 20, SP Fordale, New York, 1/13/72
- 410, File 13, SP Fordale, New York, 1/12/72
- 419, File 12, SP Fordale, New York, 1/13/72, cancel
- 427, File 20, SP Fordale, New York, 1/13/72, Lead Investigation
- 428, File 20, SP Fordale, New York, 1/13/72, added information

ARREST REPORT
Troop F Case No. 138-222
Station Ferndale Date February 13, 19 72 B.C.I. No. NN-88
JC 2/17/72

Prisoner's Name FOYE GEORGE THOMAS
SURNAME FIRST MIDDLE
Address 17 Polton Street, Monticello Sullivan New York
STREET & NO. CITY-VILLAGE ZONE COUNTY STATE
Alias GEORGE THOMAS Color Black Sex M Age 30 DOB 5/9/41
Height 5-5 Weight 135 Build Med. Hair Black Eyes Brown Glasses No
Complexion Dark Teeth Good (DESCRIBE VISIBLE CONDITION)
Scars, marks, tattoos Track marks both arms
Deformities None
Marital Status Separated (IF DIVORCED, WHERE OBTAINED) Occupation Groom
Employer Monticello Racetrack, Monticello, NY ADDRESS
Place of Birth Wilmington, North Carolina If foreign born, date and place of entry into U.S.
U.S. Citizen yes YES-NO

Name of Crime Manslaughter 1st. Degree
Section 125.20 Subdivision 1 of the Penal Law

Brief description of crime Did intentionally cause serious physical injury to MICHAEL HARDEN by the use of hands and a belt and inflicted to MICHAEL HARDEN's head and body bruises and abrasions resulting in the death of said MICHAEL HARDEN.
Place of crime V/Monticello County Sullivan Date 4/70 - 10/71 Time AM
Place of arrest New York City County New York Date 1/13/72 Time 2:40 PM

Complainant Inv. C. D. Brown, SP Ferndale, NY NAME ADDRESS

Authority for arrest warrant

Arraignment date 1/13/72 Time 7:00 ~~XX~~ PM Status or plea not guilty

Court: Village Justice, Monticello, NY Sullivan
NAME OF COURT ADDRESS COUNTY

Judge or Justice BURTON LEDINA

Date bailed _____ Amount of bail \$ 10,000.00 Date disposed of pending

Final charge pending NAME OF CRIME AUTHORITY FOR REDUCTION

Sentence or other disposition pending IF NOT GIVE NAME AND DEPARTMENT OF RECEIVING OFFICER

Arresting officer C. D. Brown/J. D. Mackay Investigators
NAME RANK

Supervising officer F. G. Dirschka Captain/BCI
NAME RANK

Military service None BRANCH Refused to answer DATES Refused to answer SERIAL NO., IF KNOWN Social Security No. 238-60-315 IF AVAILABLE

Name and Address of spouse Refused to answer (IF FEMALE, INCLUDE MAIDEN NAME)

Parents of subject Refused to answer NAMES Refused to answer ADDRESS

Parents of spouse Refused to answer NAMES Refused to answer ADDRESS

Examined physically no YES-NO If yes, by whom Refused to answer NAME Refused to answer ADDRESS

Examined mentally no YES-NO If yes, by whom Refused to answer NAME Refused to answer ADDRESS

Liquor: Non-user - Moderate - Intemperate. Uses drugs yes YES OR NO heroin TYPE

Photo taken yes YES-NO By whom Inv. E. T. Mc Kenna Troop I.D. No. F-8458

Prints taken yes YES-NO By whom Inv. E. T. Mc Kenna Troop I.D. No. F-8458

Prior convictions (list felonies first - if additional space is needed use space at bottom of form)

Date	Name of crime	Place	Disposition
1971,	Robbery	Monticello	pending
1971,	Endangering the Welfare of a Child	Monticello	pending

Is defendant on parole or probation no YES-NO If yes, name and address of parole or probation officer

Accomplices (name and address)

DELOIS HARDEN, 17 Pelton Street, Monticello, New York

Remarks:

Troop F ARREST REPORT Case No. 138-22
Station Ferndale Date January 12, 72 B.C.I. No. NN-88
JC 2/17/72

Prisoner's Name HARDEN DELOIS NMN
SURNAME FIRST MIDDLE

Address 17 Pelton Street, Monticello Sullivan New York
STREET & NO. CITY-VILLAGE ZONE COUNTY STATE

Alias None Color Black Sex F Age 21 DOB 6/23/50

Height 5-5 Weight 145 Build Med. Hair Black Eyes Brown Glasses Yes

Complexion Med. Teeth Good (DESCRIBE VISIBLE CONDITION)

Scars, marks, tattoos 6 inch vertical scar inside of right wrist

Deformities None

Marital Status Single (IF DIVORCED, WHERE OBTAINED) Occupation Housewife

Employer None NAME ADDRESS

Place of Birth Arlington, Ga. If foreign born, date and place of entry into U.S.
U.S. Citizen yes YES-NO

Name of Crime Manslaughter 1st. Degree

Section 125.20 Subdivision 1 of the Penal Law

Brief description of crime Did intentionally cause serious physical injury to MICHAEL HARDEN by use of hands and belt and inflicted to MICHAEL HARDEN's head and body bruises and abrasions resulting in death to said MICHAEL HARDEN.

Place of crime V/Monticello County Sullivan Date 4/70 - 10/71 Time AM PM

Place of arrest V/Monticello County Sullivan Date 1/12/72 Time 4:30 PM

Complainant Inv. C. D. Brown, SP Ferndale, NY NAME ADDRESS

Authority for arrest warrant

Arraignment date 1/12/72 Time 7:00 PM Status or plea not guilty

Court: Village Justice Court, Monticello, NY Sullivan
NAME OF COURT ADDRESS COUNTY

Judge or Justice BURTON LEDINA NAME

Date bailed pending Amount of bail \$ 10,000.00 Date disposed of pending

Final charge pending NAME OF CRIME AUTHORITY FOR REDUCTION

Sentence or other disposition pending IF TOT GIVE NAME AND DEPARTMENT OF RECEIVING OFFICER

Arresting officer C. D. Brown Investigator
NAME RANK

Supervising officer F. G. Dirschka Captain/BCI
NAME RANK

Military service None BRANCH None DATES None SERIAL NO., IF KNOWN Social Security No. 000-4-1000 IF AVAILABLE

Name and Address of spouse None IF FEMALE, INCLUDE MAIDEN NAME

Parents of subject LORRAINE HARDEN, 53 Liberty St., Monticello, NY NAMES None ADDRESS

Parents of spouse None NAMES None ADDRESS

Examined physically no YES-NO If yes, by whom None NAME None ADDRESS

Examined mentally no YES-NO If yes, by whom None NAME None ADDRESS

Liquor: Non-user - Moderate - Intemperate. Uses drugs no YES OR NO None TYPE

Photo taken yes YES-NO By whom Inv. C. D. Brown Troop I.D. No. F-8457

Prints taken yes YES-NO By whom Inv. C. D. Brown Troop I.D. No. F-8457

Prior convictions (list felonies first - if additional space is needed use space at bottom of form)

Date	Name of crime	Place	Disposition
10/71	Endangering Welfare of a Child	Monticello	pending

Is defendant on parole or probation no YES-NO If yes, name and address of parole or probation officer

Accomplices (name and address)
GEORGE THOMAS FOYE, 17 Pelton Street, Monticello, NY

Remarks:

COUNTY OF SULLY () ss
TOWN OF LIBERTY ()

January 11, 1972

I, PATRICIA MANNION, age 24, residing at 17 Pelton Street, Monticello, New York, employed at the Concord Hotel, Kiamacha Lake, New York give this statement to Inv. C.D. Brown in regards to the beatings of MICHAEL HARDEN which occurred at the Apartment house at 17 Pelton Street, Monticello, New York.

I further state that sometime during the month of April, 1971, I was in my apartment just getting out of the bathtub when I heard BIRD in the bathroom with MICHAEL. BIRD was beating MICHAEL with what sounded like a belt. BIRD would say "BOY? are you going to say it? The kid would say NO and it sounded pitiful. Then BIRD would say "what are you going to say? Then he would say "mother-fucker-, say it. As soon as the child would say it, he would hit the child. then he would tell Michael to say it again and then I could hear him hit the child again with what sounded like the belt. BIRD then would ask the child what he was going to say and when the child didn't answer, he hit him again. Then he would tell the child to say mother-fucker again and continue to whip the child. This lasted for a good twenty minutes. I could hear this because the window in the bathroom of the apartment occupied by BIRD and LOIS was broken out.

I swear that this statement is the truth to the best of my knowledge and belief.

Patricia Mannion

Witnesses

Inv. C. D. Brown
Inv. C. D. Brown

January 12, 1972

I, ELIZBETH ROBERTS, age 37, my date of birth being August 7, 1934, I reside at the Little Britain Tráiler Park, Liberty, New York, I am presently employed at the Concord Hotel, Kiamesha Lake, New York. I give this statement to Investigator C.D. Brown of the New York State Police at the Ferndale Barracks in regards to knowledge I have in regards to a MICHAEL HARDEN during the period of time I resided at 17 Pelton Street in Monticello, New York,

I further state that during the period of time I resided at 17 Pelton Street, Monticello, New York, I lived in Apartment 2 which is located on the first floor of the apartment building. At that time, the two people that were living in Apartment number 1 were known to me as BIRD and LOIS. They had three children living in the apartment with them. The Childrens names were MICHAEL, TITIA and CHRISTOPHER. During the period of time I resided at the apartment, about a year and one half, on many occasions I heard BIRD beating MICHAEL. He always refered to the child as "BOY". It sounded like the boy was being beaten with a belt. BIRD was usually in the bathroom of the apartment during the times he was beating the child. When he was beating the child, he always was hollering "hey boy" or "mother-fucker". After what sounded like the boy being struck by a belt, and the hollering by BIRD, I heard a thump against the wall and then BIRD would say "Mother-fucker" get your ass in there and sit on the Toilet. These beatings occurred normally a couple of times a week during the period of time that I lived at the Apartment.

I resided at the apartment at 17 Pelton Street, Monticello, New York from April of 1970 ~~through~~ thru October of 1971. The subject *ER* I refer to in the above statement as BIRD I have heard referred to as GEORGE FOYE.

I swear that this statement is the truth to the best of my knowledge and belief.

Subscribed and sworn before me
this 12th day of January 1972

Linda Roidl
Linda Roidl, Notary Public
Sullivan County, N. Y., #53-3331880
Comm. expires Mar. 30, 1975

Elizabeth Roberts

STATE OF NEW YORK
COUNTY OF NEW YORK
CITY OF NEW YORK

February 10, 1972

I, ANNIE LEE PARHAM, age 28 years, DOB October 16, 1943. I reside at Concourse Plaza Hotel, East 161st Street, Bronx, New York, Room 522, Bronx, New York.

I give this statement to Investigator C. D. BROWN at SP Manhattan in regards to information I have concerning the health and welfare of MICHAEL HARDEN whom I knew when he resided at 17 Pelton Street, Monticello, New York with his mother, DELOIS HARDEN and GEORGE FOYE.

Q Annie would you tell me what happened in regards to the condition and health of MICHAEL HARDEN when you were at DELOIS HARDEN'S apartment at 17 Pelton Street, Monticello, New York on October 24, 1971?

A When I first arrived there it was on October 23, 1971 about about 8:30 at night. I walked into the apartment and little MICHAEL was sitting on the floor beside the radiator facing the closet and his back to the television. I spoke to MICHAEL, he said "HI" to me. I noticed his face, it looked swollen, both eyes were black. I asked LOIS, what happened to MICHAEL'S eyes. LOIS told me that MICHAEL had a cold in his eyes. I stood and looked at LOIS for about five minutes and asked her who she was kidding. She never did answer me. So I asked her to keep the baby for me. She said OK so then my friend MAGGIE went back to Trotter's Bar on Broadway. I didn't come back to LOIS' house until Sunday morning, about 8:30 or 9:00. MICHAEL was still sitting in the same position as when I had left the night before. When I walked in GEORGE FOYE was sitting at the kitchen table so then MARGIE and I decided to spend the day. During the time I was there I was sitting in the front room where MICHAEL was sitting I started noticing MICHAEL. He would try to stand up. Everytime he tried, he seemed to get dizzy and grab his head. So this went on for about half an hour. So I called LOIS' attention to it. I asked LOIS if MICHAEL was all right. She said, Yes, Why? I told her every time MICHAEL tried to get up on his feet he seemed to me like he was dizzy. LOIS told me MICHAEL only was sleepy. So we were drinking beer then, called LOIS attention again, she then told MICHAEL to get up on the bed. MICHAEL got off the floor the best he could. He staggered to the bed and laid down beside GEORGE FOYE and his body

missed and touched against GEORGE. GEORGE told him to keep his little mother-fucken ass still. Then GEORGE got off the bed, got dressed and went out to the store to get Pampers for the other two kids. During this time LOIS was in the kitchen preparing dinner. MICHAEL tried to get off the bed and he staggered and fell back on the bed holding his head. Then I said to MICHAEL "Are you all right?". But MICHAEL didn't answer me. Then I called LOIS attention again and I told her MICHAEL wasn't sleepy, but that he was sick. By that time GEORGE had come back from the store, MARGIE and I grabbed MICHAEL and laid him back on the bed. At this time LOIS was screaming and hollering. At this time I was trying to quiet LOIS down and asked her if MICHAEL had ever been like this before. MICHAEL was like going unconscious, his eyes were rolled back in his head. He started slobbering from the mouth. So I asked MARGE if she seen anything like this before. She said it could be convulsion but she couldn't be sure. Then at this time he looked like he was going to swallow his tongue. And MARGE told me to get a spoon. We would put the spoon in his mouth to keep him from swallowing his tongue. So as we held the spoon in his mouth I told GEORGE to go call a doctor. GEORGE said, "What doctor, doctor, hell what doctor?" So I told him to call Doctor SULVINKUS. LOIS told him the number was in the drawer. After he found the number he went out and came back in about 20 minutes and told us that he called Dr. SULVINKUS but the doctor said he didn't make house calls. So at this time I was quite upset, then I thought about the hospital so I told him to get the car started so he could take MICHAEL to the hospital. At this time MICHAEL was very cold and shaking. So I got a blanket from LOIS and wrapped MICHAEL in the blanket. After that MARGE and GEORGE took MICHAEL to the car. They put him in the car. MARGE started back to the house and then I asked her to go to the hospital with MICHAEL and they left.

Q Annie, at anytime during this period of time that you have described while you were at the apartment on October 24, 1971 did you observe MICHAEL fall and strike a radiator in the apartment?

A No, not during the time I was there.

Q Annie, on other occasions while you were at the apartment, did you see MICHAEL abused or mistreated?

A Yes, I have.

Q Would you describe these instances to me.

A I've been at the apartment once when little MICHAEL wet on himself, LOIS fussed at him for doing it. She asked him why did he wet on himself. By this time GEORGE had grabbed MICHAEL smashed him through the kitchen into the bathroom, closed the door behind him. I couldn't see what went on in the bathroom but I could hear things falling, like MICHAEL was being thrown or shoved against things in the bathroom. I could hear him cursing, saying to MICHAEL "You dumb little mother-fucker". After this he brought MICHAEL out of the bathroom, standing in the kitchen by the kitchen table. He picked MICHAEL up by his neck from the front and with the force he threw MICHAEL, he went into the front room landing on his bed and striking the back of his head on the window sill.

Q What did he say when he threw MICHAEL?

A He said, "This little mother-fucker will never learn".

Q Annie, Do you know about when this incident occurred?

A It was around Thanksgiving time in 1970.

Q Annie, was there other instances when you saw GEORGE FOYE misuse MICHAEL?

A Yes, on numerous occasions. I don't recall the dates. He struck him on the side of the head with his hand hard like you would hit a grown person.

Q Annie, was there occasions when you saw LOIS mistreat MICHAEL?

A Yes, In June 1971, I was at the apartment visiting LOIS, MICHAEL had wet on himself. So LOIS asked MICHAEL why he didn't tell her that he had to use the bathroom. MICHAEL didn't answer her. So I told LOIS not to argue at him because he was just a baby. Then LOIS made MICHAEL go to the bathroom and stand over the commode holding his penis in his hand. I stayed there over two hours and when I left little MICHAEL was still made to stand there holding his penis.

Q Annie, can you recall of the may instances you were at the apartment to visit LOIS having ever seen little MICHAEL being fed?

A No.

AdP

- Q Were any of these visits for a long period of time?
- A Sometimes I spent all day with LOIS and did not see MICHAEL fed during this time.
- Q Annie, is there anything else that you can recall at this time that occurred while you were at the apartment which you would care to add to this statement?
- A No.

I swear that this statement is the whole truth to the best of my knowledge and belief.

Sworn to before me this 10th
day of February, 1972.

Annie Lee Parham

Arthur J. Schnell
ARTHUR J. SCHNELL
Notary Public, State of New York
No. 30-8834835
Qualified in Nassau County
Term Expires March 30, 1972

CITY OF NEW YORK)

I, MAGDALINA TIRADO, age 28, my date of birth being February 1, 1944, I reside at 315 West 94th Street, New York City, N.Y., I am presently unemployed, and live in apartment 724 at the above address. I give this statement to Investigator C.D. Brown of the New York State Police in regards to information concerning MICHAEL HARDEN which occurred while I was in Monticello, New York on October 23 and 24th, 1971 with ANNIE LEE PARHAM.

Q. MAGDALINA, would you explain to me what occurred while ~~you~~ you were at the apartment in Monticello, New York, with Annie Parham?

A. We went to the apartment at about 8:30 PM on a Saturday night and Michael was sitting in the corner by the radiator facing the radiator. He didn't say anything that I can recall while we were there. I called for the baby, Michael, to come to me but the guy that was there they called BIRD told Michael to turn around and shut up you little mother-fucker. Michael turned around and stayed in the corner.

Q. Did anything else occur while you were there on Saturday night that you can recall?

A. No.

Q. MAGDALINA, what occurred while you were at the apartment on Sunday? This is in regards to Michael.

A. Michael was sitting in the corner by the radiator where he had been the night before when we left. I noticed his eyes and forehead were kind of blue and swollen. He would try to get up from where he was on the floor and couldn't make it. He did crawl across the floor and tried to get up onto the bed where BIRD was laying. When he was trying to climb onto the bed, BIRD gave him a hard shove back onto the floor and said "get back where you belong, you little mother-fucker". Then MICHAEL crawled back to the place by the radiator.

Q. MAGDALINA, how long after this did MICHAEL START making what ~~you~~ you referred to as funny noises?

A. It was about five minutes later.

Q. What if anything did you do then?

A. I called to his mother who was in the kitchen at that time and tell her to bring a spoon. I told her to call a doctor and she said doctors were prejudiced. Then she said nothing was wrong with him, he was just acting up. Then she started shaking his arm and leg and telling him to wake up.

Q. MAGDALINA, what did BIRD say when you wanted to take the baby to the doctors?

A. He said there was nothing wrong with the little mother-

fucker, he was just acting up and he told him, "you little mother-fucker, quite acting up. He said then that he wasn't going to take him to the doctors.

Q. When did he decide to take him to the hospital?

A. Annie, and myself kept badgering him about it. After I had the spoon in the little boy's mouth for probable thirty minutes, he finally took us to the hospital. He was madder then hell because he had to take us up to the hospital.

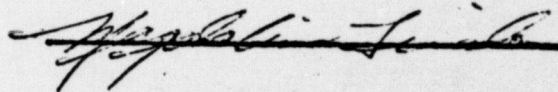
Q. MAGDALINA, is there anything else you can recall that occurred while you were at the apartment involving MICHAEL?

A. No.

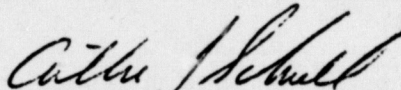
Q. MAGDALINA, is there anything you wish to add to this statement?

A. No.

I swear this statement is the true to the best of my knowledge and belief.



Sworn to before me this
10th day of February, 1972



ARTHUR J. SCHNELL
Notary Public, State of New York
No. 30-8334835
Qualified in Nassau County
Term Expires March 30, 1972

FOYE, DOB 5/9/41, 17 Pelton Street, Roseton, New York at the
 Horton Hospital, Middletown, New York. FOYE related that he had
 been living with DELOIS HARMON for approximately 2 1/2 years. During
 subject's interview, FOYE admitted striking the child with a belt
 on previous occasions when the child failed to do as he had instructed
 him. He related that during the time of the alleged fall by the child
 at which time he allegedly struck the radiator, he had been in the
 living room area lying on the bed sleeping and had not been involved
 in any acts of discipline involving the child at the time of the alleged
 incident. When questioned as to the subject named HARMON, who had been
 at the apartment during the period of time that the child had allegedly

#17

Ferndale
 NY-1942

fell and struck his head on the radiator, he stated he did not know
 her and believed that she was a friend of his common-law wife. No
 further useful information was gained from the interview with FOYE.

U. S. DISTRICT COURT
 N. D. OF N. Y.
 FILED
 SEP 4 1974

AT O'CLOCK M.
 L. R. SCULLY, Clerk
 ALBANY

Court Exhibit
 2

9/4/74
 Ct & 2 Handled up by
 Attorney Dandoff
 only these 4 copies
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 Pg 41 R - Appellate
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Exhibit "A"

Supplemental 224
 441 111 3-1-1974

UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Relator-Petitioner,

-against-

73-CV-547

J. E. LaVALLEE, Superintendent of Clinton
Correctional Facility, Dannemora, New York,

Respondent.

APPEARANCES:

OF COUNSEL:

MICHAEL DAVIDOFF, ESQ.
Attorney for Relator/Petitioner
Ten Hamilton Avenue
P.O. Box 809
Monticello, New York 12701

EMANUEL GELLMAN
District Attorney
Sullivan County Courthouse
Monticello, New York 12701

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for Respondent
New York State Department of Law
Capitol
Albany, New York 12224

JOSEPH R. CASTELLANI
Assistant Attorney General

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

By memorandum-decision and order dated January 4, 1974, I
denied and dismissed a petition of the petitioner for habeas corpus.

The petitioner had been convicted of Class A. Felony of murder of a child in Supreme Court, Sullivan County, on July 31, 1973. He was represented at the trial and throughout the State appeals by the same attorneys who prepared and filed his federal petition for habeas corpus. My decision of January 4, 1974, as it indicated, was written after a review of the State court trial and appellate records.

By decision of the Court of Appeals, Second Circuit, dated June 10, 1974, District Judge Tyler, writing for the three Judge Panel, remanded for further proceedings. The decision is reported in 499 F.2d 1242. The remand was specifically for me to examine a complete copy of report of Investigator Brown of the New York State Police, particularly in regard to the notes of this investigator's conversations with petitioner and his co-defendant Delois Harden. Investigator Brown and Delois Harden both testified at the trial for the prosecution. The concern of the Second Circuit Panel in remanding was that Investigator Brown's report may not have been fully disclosed to defense counsel after his direct examination, might possibly contain exculpatory material that would have been favorable to defense counsel in the cross-examination of Brown, and strategy of defense during the trial, and thus constitute violations of constitutional proportions, contrary to the principles of

Brady v. Maryland, 373 U.S. 83 (1963), in that the prosecution failed to disclose evidence favorable and vital to the defense.

Pursuant to the limited remand direction, by memorandum-decision and order dated August 14, 1974, a hearing was set for September 4, 1974 in Albany, and at the request of petitioner's counsel, a writ of habeas corpus issued to produce from State confinement the petitioner in Court, in Albany, for the hearing. The hearing was held and consisted of legal argument by petitioner's counsel, Attorney Davidoff, and District Attorney Gellman of Sullivan County. The petitioner was not called to testify nor was any other testimony offered. The District Attorney resisted disclosure of the entire Brown report to petitioner's counsel at the hearing, and probably rightly so in view of the express Second Circuit Court of Appeals ruling that "we remand for a hearing before him (Judge Foley) so that he will be able to examine the report in its entirety". However, my direction that the report of Brown be so furnished to Attorney Davidoff was finally accepted by the District Attorney, and in addition to Brown's report, he furnished the entire State Police investigative report. These reports shall be filed as Appendix A and Appendix B to this decision for convenient reference in the event of further review in the Court of Appeals, Second Circuit. Attorney Davidoff, in his Supplemental Brief for Relator/Petitioner, has set forth on pages 4-6 the particular

portions of the entire Investigative Report which he believes are crucial, tended to support the defense of the petitioner, and are therefore exculpatory.

From my review of these portions relied upon by the attorney for the petitioner, I am not impressed at all that this analysis that such investigative comments and writings tend to support the defense is tenable. The refusal of admittance to an apartment and the cookie jar incident in the investigative excerpts pointed out as crucial border in my judgment on the insignificant that would have little value in the preparation of defense. Any significance in the development of exculpatory evidence in behalf of the petitioner during his jury trial from these excerpts is not apparent to me. The argument mainly seems to be aimed at evidence being withheld that might implicate Delois Harden in cruelty to the child. But, she pleaded guilty, and that type of evidence indicating criminal responsibility on her part would not tend in itself to exculpate the petitioner. These facts concerning her conduct were developed at the trial and there is nothing in the entire investigative reports now full disclosed that could form the basis for conclusion that evidence favorable and vital to the petitioner's interests was withheld by the prosecution that was detrimental to proper preparation of defense and cross-examination at the trial of any of the prosecution witnesses. The opposing affidavit of District Attorney

Gellman, received October 11, 1974, that shall be filed with the Clerk with this decision, points clearly to the factors in the report and testimony described as crucial in Attorney Davidoff's supplemental brief as not being so in any instance. There is nothing shown in the nature of significant exculpatory evidence being withheld during the State prosecution.

There is nothing evident to me from my reading of the investigative reports that would lead to the drastic conclusion to set aside this state conviction. *Giglio v. United States*, 405 U.S. 150, 154 (1972), explains that a new trial is not required whenever a combing of the prosecutor's files after the trial discloses evidence possibly useful to the defense but not likely to have changed the verdict. In the instance here, it is my judgment that the investigative report materials would in no event have changed the verdict, and it is very doubtful to my mind any of it would have been useful to the defense. It must also be noted that a defendant may not obtain a new trial on the basis of evidence that could have been discovered by reasonable diligence. *U. S. ex rel. Regina v. LaVallee*, Supt., sl. ops. Nos. 1066, 1067, decided October 2, 1974, p. 5611, 2 Cir., citing cases. It is also somewhat encouraging to note that in *Giles v. Maryland*, 386 U.S. 66, at p. 81, involving disclosure questions of this kind that Justice Brennan stated, "The truism that our federal system entrusts the States with primary responsibility in the criminal area means more than merely "hands off" '.

The denial of the petition by my decision dated January 4, 1974, is reaffirmed for the foregoing reasons, and the petition ~~is~~ as corpus is again denied and dismissed. As previously done by decision of January 22, 1974, in view of the remand, a certificate of probable cause is again granted and hereby issues in regard to this decision.

It is so Ordered.

Dated: February 4, 1975

Albany, New York

s/ James T. Foley
UNITED STATES DISTRICT JUDGE

**NEW YORK STATE POLICE
COVER PAGE**

FILE NO. **49-62**

REPORTING TROOP F	MANAGING TROOP F	DATE 12/14/71	INVESTIGATIVE PERIOD 10/24/71 - 12/14/71
TITLE OF CASE GEORGE THOMAS FOYE DELOIS HARDEN Complainant: LOUIS YANK Chief of Police Monticello, N.Y.		REPORT OF Inv. C. D. Brown/ CB	TYPED BY 12/15/71 LP
		CHARACTER OF CASE ENDANGERING WELFARE OF CHILD/M/	
		Ferndale MM-1942	

-C- (Arrest)

ENCLOSURES: To Division Headquarters and Troop F:

- 1. General 5 - Arrest Report of GEORGE THOMAS FOYE (1).**
- 2. General 5 - Arrest Report of DELOIS HARDEN (1).**
- 3. Arrest Summary for District Attorney (1).**

APPROVED 8	FOR TROOP/DIVISION HEADQUARTERS USE ONLY	
DISTRIBUTION 1 - Division Headquarters 1 - Troop F	DESTROY IN 19 _____	INITIALS _____
	PERMANENT RETENTION _____	INITIALS _____
	CLOSED BY: _____ Arrest _____ Investigation _____ Statute of Limitations	

ENDANGERING WELFARE OF CHILD/M/

Ferndale MM-1942

SYNOPSIS:

On 10/24/71, LOUIS YANK, Monticello, New York reported a child, MICHAEL HARDEN, DOB 5/15/67, 17 Pelton Street, Monticello, New York being admitted to the Monticello Community General Hospital, Monticello, New York with injuries which were possibly inflicted as a result of a child beating. Subsequent investigation resulted in the arrest of the mother of the injured child, DELOIS HARDEN, DOB 6/23/50, and GEORGE THOMAS FOYE, DOB 5/9/41, both of 17 Pelton Street, Monticello, New York for a violation of Section 260.10, Subdivision 1 of the Penal Law of the State of New York, Endangering the Welfare of a Child. Upon the arraignment before a local magistrate, both subjects entered pleas of "not guilty" to the charge and were committed to Sullivan County Jail, Monticello, New York in lieu of bail. This case closed by the arrest of DELOIS HARDEN and GEORGE THOMAS FOYE.

DETAILS:

AT FERNDAL, NEW YORK

1. On 10/24/71, LOUIS YANK, Chief of Police, Village of Monticello, New York telephonically contacted the Ferndale Station and reported a child had been admitted to the hospital in Monticello, New York with injuries apparently inflicted as a result of a child beating. At this time he requested the State Police conduct an investigation into same.

AT MONTICELLO, N.Y.

2. On 10/24/71, at approximately 8:00 P.M. interviewed Sergeant ROGER BISLAND, Monticello PD, Monticello, New York. BISLAND reported that Dr. ISADORE GREENBERG, Monticello, New York had contacted his department at approximately 3:00 P.M. this date, and reported that a child had been brought into the hospital in an unconscious condition with an apparent head injury and bruises over a large portion of the body. BISLAND further related that the child had been removed from the Monticello Community General Hospital, Monticello, New York and taken to the Horton Hospital, Middletown, New York at 4:10 P.M., this date. This transfer was due to the child needing an apparent operation for head injury of which facilities were not available at the Monticello Community General Hospital. He further related that the initial interview conducted at the hospital had been by Patrolman HOWARD MORGAN, Monticello PD.

3.

On 10/24/71, interviewed Patrolman HOWARD

Ferndale
MM-1942

MORGAN, Monticello Police Department, Monticello, New York. At this time MORGAN related that upon arriving at the hospital, he had interviewed the mother of the injured child, DELOIS HARDEN, 17 Pelton Street, Monticello, New York. At this time, HARDEN related to Patrolman MORGAN that the child had fell against a hot water radiator in the living room of Apartment #1 at the Pelton Street address and then had what she referred to as a seizure and the child had gone into unconsciousness. While at the hospital, Patrolman MORGAN interviewed a colored female who identified herself as MARGE MANSO, 315 West 94th Street, New York City, New York who related to him she had been in the room when the child fell and she confirmed the story of the mother that the child had struck its head on the radiator. Patrolman MORGAN could offer no further information to aid in the investigation.

AT MIDDLETOWN, N.Y.

4. On 10/24/71, with Investigator L. J. Topping and Investigator S. W. Catizone, investigation was continued at the Horton Hospital, Middletown, New York. At this time interview was conducted with supervising nurse, CONSTANCE RAYMOND, 32 Harrison Street, Middletown, New York. RAYMOND reported that the child had been brought by ambulance to the Horton Hospital in an unconscious condition and was presently being treated by Dr. BRUCE RALSTON, Middletown, New York. She further related that upon the child being brought into the Emergency Room, he had been examined by her and two additional nurses, HELENA WADRISKI, RD #2, Port Jervis, New York and CHERYL SCHULTZ, Middletown, New York. She related that this examination by her and the two additional nurses resulted in bruises being noted upon the child's chest and stomach area and about the legs. She related that the bruises appeared to be old bruises which apparently had been administered over a period of time. She was unable to give any additional information at this time which would further aid in the investigation.

5. On 10/24/71, interviewed DELOIS HARDEN, 17 Pelton Street, Monticello, New York, DOB 6/23/50, at the Horton Hospital, Middletown, New York. This subject being the mother of the injured child. She related that she had been in the kitchen of

Ferndale
MM-1942

the apartment preparing a meal when a friend of hers of whom she stated she only knew the first name, MARGE, had advised her that her son had fell and struck his head on the radiator in the living room area. She related that she had picked the boy up and laid him on a couch in the living room at which time he started to have what she described as a seizure. She related that the child had had a past history of seizures from the time he was approximately 1 year old. When asked as to medical attention for this condition, she related that she had not had the child to a physician in regards to same and she believed nothing could be done for it. At this time she was further interviewed relative to the apparent old bruises on the body of the four year old child. She stated that she had disciplined the boy with a belt over a period of time and this was possibly where the bruises had occurred. When inquiry was made as to the severity of striking the child with a belt, she merely stated that when he did not do as she instructed him, she had beat him with the belt. She denied having participated in any acts of discipline at the time the child fell and struck the radiator, as she alleged. She continued that she had been living with GEORGE FOYE since 3/17/69 and that this relationship had resulted in two additional children, TASHIA, DOB 7/7/70 and CHRISTOPHER, DOB 8/8/71. Under further questioning as to the frequency of the beatings and the reasons for same, she related that the child was not properly "house broke" and that when he failed to use the bathroom, she beat him with the belt. At this time she declined any further discussion of the case.

4. On 10/24/71, interviewed GEORGE THOMAS FOYE, DOB 5/9/41, 17 Pelton Street, Monticello, New York at the Horton Hospital, Middletown, New York. FOYE related that he had been living with DELOIS HARDEN for approximately 2½ years. During subject's interview, FOYE admitted striking the child with a belt on previous occasions when the child failed to do as he had instructed him. He related that during the time of the alleged fall by the child at which time he allegedly struck the radiator, he had been in the living room area lying on the bed sleeping and had not been involved in any acts of discipline involving the child at the time of the alleged incident. When questioned as to the subject named MARGE, who had been at the apartment during the period of time that the child had allegedly

Ferndale
MM-1942

fell and struck his head on the radiator, he stated he did not know her and believed that she was a friend of his common-law wife. No further useful information was gained from the interview with FOYE.

5. On 10/24/71, reinterviewed CONSTANCE RAYMOND, Head Nurse, Horton Hospital, Middletown, New York. At this time RAYMOND furnished 3 photos which had been taken on a polaroid camera at the time MICHAEL HARDEN was brought into the Horton Memorial Hospital.

AT MONTICELLO, N.Y.

6. On 10/25/71, interviewed Dr. ISADORE GREENBERG, Monticello, New York. GREENBERG related that he was the physician called to the hospital at the time MICHAEL HARDEN was brought to the hospital for treatment on 10/24/71. He stated that upon examining the boy, he immediately contacted the Monticello Police Department as it was his belief the child had been beaten over an extended period of time. After examination of the injured child, GREENBERG related that he had ordered the child transported to Horton Hospital, Middletown, New York as the treatment he believed required was not available at the Monticello Community General Hospital. He related that he had not treated the child prior to this incident and could give no additional information to aid in this investigation.

7. On 10/25/71, interviewed LORRAINE HARDEN, Age 68, 53 Liberty Street, Monticello, New York. This subject is the mother of DELOIS HARDEN, and grandmother of the injured child. She related that she had been at her daughter's apartment, 17 Pelton Street, Monticello, New York sometime back at which time she witnessed GEORGE FOYE place MICHAEL, her grandson, face down on an ironing board cover in the bathroom and beat him with a belt. She further related that he held the child face down in the cover so he couldn't holler and beat him with a belt for what she described as approximately 10 minutes. This incident allegedly occurred at approximately 1:00 O'clock and GEORGE FOYE made MICHAEL stand in the bathroom after the beating and related that the child was still standing in the bathroom when she left the apartment at approximately 3:00 O'clock. She further related that she had been at the apartment on Friday, the 15th day

Ferndale
MM-1942

of October, 1971 when she had seen her daughter beat the child, MICHAEL, with a belt. She related that this incident occurred when the child was standing in the corner by the radiator, where she alleges the child was made to stand a large portion of the time and the daughter had beat him with a belt because the child had turned around and looked at her. She further related that when she was striking the child with a belt, she grabbed him by the arm, picked him up and beat him with a belt with the right hand and upon finishing the striking with the belt, she threw him in the corner against the clothes closet. At this time, LORRAINE HARDEN was asked if she would give a deposition in regards to what she had seen. She related that she would. Mrs. HARDEN was immediately transported to the Monticello Police Department, Monticello, New York where the statements she had made were reduced to writing in the form of a supporting deposition of which Mrs. HARDEN signed.

8. On 10/25/71, interview was conducted with ELIZABETH ROBERTS, Little Britain Trailer Park, Liberty, New York. ROBERTS related that she had lived in the apartment building at 17 Pelton Street, Monticello, New York until 10/15/71. She related that during the period of time she had lived in the apartment building at Pelton Street, she had heard acts in the apartment occupied by HARDEN and FOYE which she believed to be misuse of the child, but she declined to give a statement in regards to same at this time.

9. On 10/25/71, interviewed PAT MANNION, age 24, 17 Pelton Street, Monticello, New York. This subject occupies Apartment 3 in the same building as the apartment occupied by HARDEN and FOYE. She also related that she had heard what appeared to be misuse of the child in the HARDEN, FOYE apartment, and she also declined to give a statement in regards to same at this time.

10. On 10/25/71, interviewed IONE KELLEY, age 28, 17 Pelton Street, Monticello, New York. This subject related

Ferndale
MM-1942

that she occupied Apartment #4 which is located on the second floor of the apartment building. She related that she had heard nothing and was unable to give any information which would aid in the investigation.

11. On 10/25/71, interview was conducted with ANN COPEL, age 46, 388 Broadway, Monticello, New York. This subject was interviewed relative to the possibility of her being at the HARDEN/FOYE apartment during the time the child allegedly fell. She related that she knew HARDEN but she had not been at the apartment and could offer no information which would further aid in the investigation.

12. On 10/25/71, interviewed Chief LOUIS YANK, Monticello PD, Monticello, New York. Chief YANK related that his department was unable to furnish any additional information which would aid in this investigation.

AT FERNDALE, N.Y.

13. On 10/25/71, telephonically interviewed Mr. ROBERT DICKSTEIN, Social Services Department, Horton Memorial Hospital, Middletown, New York. At this time, DICKSTEIN related that his department would take additional pictures of the injured subject and forward same to the State Police Barracks, Ferndale, New York.

14. On 10/25/71, telephonically interviewed IRENE WITT, attending nurse at the Horton Memorial Hospital, Middletown, New York. At this time, she reported that the child was in extremely critical condition and had not regained consciousness.

AT MONTICELLO, N.Y.

15. On 10/25/71, an accusatory instrument was prepared before Village Justice, BURTON LEDINA, Village of Monticello, Monticello, New York, supported by the deposition obtained from LORRAINE HARDEN, charging GEORGE FOYE and DELOIS HARDEN with the violation of Section 260.10, Subdivision 1 of the Penal Law of

Ferndale
MM-1942

the State of New York, Endangering the Welfare of a Child. At this time, JUDGE LEDINA issued warrants of arrest for FOYE and HARDEN.

16. On 10/25/71, arrested GEORGE THOMAS FOYE, DOB 5/9/41, and DELOIS NMN HARDEN, DOB 6/23/50, 17 Pelton Street, Monticello, New York on the warrants issued by Village Justice BURTON LEDINA charging Endangering the Welfare of a Child in violation of Section 260.10 of the Penal Law. At this time, both subjects were advised of their following constitutional rights:

- 1 - You have the right to remain silent.
- 2 - Anything you say can and will be used against you in a court of law.
- 3 - You have the right to talk to a lawyer and have him present with you while you are being questioned.
- 4 - If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one.

At this time both subjects advised that they understood their rights which had been given them and stated that they did not desire counsel present at this time. The defendants were immediately transported to the Ferndale State Police Barracks for processing.

17. On 10/25/71, GEORGE THOMAS FOYE, was fingerprinted and photographed at the Ferndale State Police Barracks and assigned Troop "F" ID Number F-8338. DELOIS HARDEN was fingerprinted and photographed and assigned Troop "F" ID No. F-8337. Upon further questioning, both subjects stated they did not desire to discuss the case at this time.

Ferndale
MM-1942

AT MONTICELLO, NEW YORK

18. On 10/25/71, GEORGE THOMAS FOYE and DELOIS HARDEN were arraigned before Village Justice BURTON LEDINA, Village of Monticello, Monticello, New York on the charge of Endangering the Welfare of a Child. At this time, both defendants entered pleas of "not guilty" and were immediately committed to the Sullivan County Jail, Monticello, New York in lieu of \$500.00 bail each.

AT FERNDAL, NEW YORK

19. On 10/25/71, a File 20, Lead Investigation was dispatched to SP Manhattan, New York requesting attempt to locate and interview of MARGE MANSO, 315 West 94th Street, New York City, New York relative to her visiting at the apartment of DELOIS HARDEN, 17 Pelton Street, Monticello, New York on 10/24/71.

20. On 10/28/71, a reply was received that the aforesaid message which related the checks had been made at 315 West 94th Street, New York City, New York, Hotel Mt. Royal, also checks were made at 317 West 94th Street, Hotel St. Louis and at 222 Riverside Drive, New York, New York, Hotel Irving Arms but all checks met with negative results.

21. On 10/26/71, Family Court Judge ROBERT WILLIAMS, Sullivan County Family Court, Monticello, New York was contacted relative to subject case. At this time, Judge WILLIAMS issued an order of removal for the removal of the additional two children from the HARDEN residence, 17 Pelton Street, Monticello, New York. Upon issuance of the order, EVA ROBERTS, Child Welfare case worker, Sullivan County Social Services Department, Liberty, New York proceeded to the apartment of GLORIA JONES, 17 Pelton Street, Monticello, New York and removed the two small children at the direction of the Family Court.

22. On 10/26/71, Mrs. EVA ROBERTS immediately took the two children to the office of DR. LUIS RODRIGUEZ, Monticello,

Ferndale
MM-1942

New York for an examination. Upon the conclusion of the examination by Dr. RODRIQUEZ, he advised Mrs. ROBERTS that the other two children were in apparent good health and showed no signs of child beating.

23. On 10/26/71, ROBERT DICKSTEIN, Social Services Department, Horton Hospital, Middletown, New York contacted the Ferndale Station and advised that the injured child, MICHAEL HARDEN, age 4, was being transported to the Montefiore Hospital and Medical Center, 111 East 210th Street, Bronx, New York for further treatment. At this time he could give no additional information in regards to the condition of the injured subject.

AT FERNDALE, N.Y.

24. On numerous occasions, since the inception of this case, the latest being 12/14/71, interviews have been conducted with EVA ROBERTS, Sullivan County Social Services Department, Liberty, New York relative to the condition of MICHAEL HARDEN. On 12/14/71, Mrs. ROBERTS reported that the child had been returned from Montefiore Hospital, Bronx, New York to the Monticello Community General Hospital, Monticello, New York and further, the injured subject was still in a coma and had been in such a state since 10/24/71.

25. This case is closed by the arrest of GEORGE THOMAS FOYE, dob 5/9/41, and DELOIS HARDEN, dob 6/23/50, 17 Pelton Street, Monticello, New York.

26. The following teletype messages were dispatched in association with this investigation:

#8541 File 13 SP Ferndale,
New York 10/25/71.....

#8548 File 20 SP Ferndale,
New York 10/25/71.....

#8563 File 20 SP Ferndale,
New York 10/25/71.....

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Petitioner-Appellant,

-against-

AFFIDAVIT OF
MAILING
Docket No. 75-2050


J. E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Respondent-Appellee.

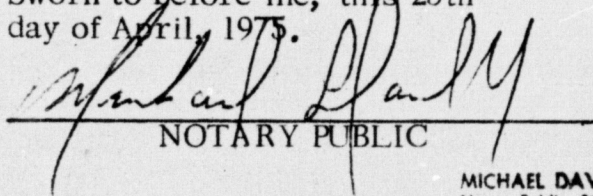
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STATE OF NEW YORK)
COUNTY OF SULLIVAN) SS.:

PETRINA TERRY, being duly sworn, deposes and says: that deponent is not
a party to the action, is over 18 years of age and resides at Bloomingburg, New York.

That on the 24th day of April, 1975, deponent served the Appendix and the
Brief (2) copies upon JOSEPH R. CASTELLANI, ESQ., the attorney for the Respondent-
Appellee, in this action at the Attorney General's Office, Department of Law, Capitol,
Albany, New York 12224, the address designated by said attorney for that purpose by
depositing same enclosed in a postpaid properly addressed wrapper, in an official
depository under the exclusive care and custody of the United States Post Office De-
partment within the State of New York.


PETRINA TERRY

Sworn to before me, this 25th
day of April, 1975.


NOTARY PUBLIC

MICHAEL DAVIDOFF
Notary Public, State of New York
Sullivan County Clerk No. 1094
My Commission Expires March 30, 1977